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International Law Decisions and Notes

U.S. Naval War College (Editor)

VESSELS: OWNERSHIP, CHARTER, AND SERVICE[a]

THE "HAELEN"

June 28, 1918

(2 Entscheidungen des Oberprisengerichts in Berlin, 177)

In the prize matter concerning the Belgian steamer *Haelen*, home port Antwerp, the imperial superior prize court in Berlin, in its session of June 28, 1918, decided:

The appeal against the judgment of the imperial prize court in Kiel of March 13, 1918, is dismissed with costs.

Statement of the facts.

Reasons: The Belgian steamer *Haelen*, en route from Montreal to Rotterdam, was brought to on November 3, 1917, by a German submarine within the German barred zone in the North Sea, and brought in to Swinemunde for closer examination. Seizure in prize ensued on November 26, 1917, through authorized agents of the admiralty staff. The vessel had a cargo of wheat for the Commission for Relief in Belgium, consigned to Rotterdam, and was possessed of a safe conduct pass, from the Swiss consul general in Montreal, which assures safe passage to vessels sailing to the account of the Commission for Relief in Belgium. A condition that the vessels shall take a course outside of the barred zones is adjoined to the privilege; otherwise they lose the right to claim special treatment.

Safe conduct.

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[a] At the meeting of the International Conference on Maritime Law in 1922 the leading maritime countries of the world were represented. The matter of the status of state-owned and state-charted vessels was considered, and the following resolution was unanimously adopted:

1. Sovereign states, in regard to ships owned or operated by them and cargo owned by them, and cargo and passengers carried in such ships, ought to accept all liabilities to the same extent as a private owner.

2. Except in the case of the ships and cargoes mentioned in paragraph 3, such liabilities should be enforceable by the tribunals having jurisdiction over and by the procedure applicable to a privately owned ship or cargo or the owner thereof.

3. In the case of—

(*a*) Ships of war; (*b*) other vessels owned or operated by the Sovereign State and employed only in governmental noncommercial work; (*c*) state-owned cargo carried only for the purpose of governmental noncommercial work in ships owned or operated by the soverign state.

Such liabilities should be enforceable only by the like tribunals but only of the state by which the ships is owned or operated, and should be enforceable by action *in personam* against such state, and in addition, by any other form of procedure permitted by the law of such state.

Claim was raised by the owners of the *Haelen* for the release of the ship and indemnity, also for loss of freight; and by the Commission for Relief in Belgium for the release of the cargo or for compensation. The claim was based on the ground that the vessel, being intrusted with a philanthropic mission, according to article 6c of the Prize Code, was not subject to capture.

Judgment of Kiel prize court.

By the judgment of the prize court at Kiel of March 13, 1918, the claims were dismissed, and the condemnation of the vessel and its cargo decreed. The prize court adopted the opinion that the premises of article 6c of the Prize Code did apply to the vessel, but that the privilege arising therefrom had been forfeited because the vessel, in addition to its philanthropic mission, had pursued other purposes in the war area for the benefit of our enemy, and had for this reason traversed the barred zone.

Against this judgment, both claimants have appealed. Whereas the owners have maintained their claims, as made in the first instance, the representative of the second claimant explained in the oral proceedings before the court of appeal that the major portion of the cargo of wheat of the Commission for Relief in Belgium had been refunded in kind. The claim was therefore only to be retained on behalf of the remainder of the cargo. Reimbursement is demanded for the value of the wheat in Canada, with the addition of freight and expenses to Europe. The claimants assert that it was only the bad weather which necessitated the captain's departure from the prescribed course. In the zone traversed, there had been neither occasion for any investigation in the interest of the enemy, nor intention on the part of the captain. In the court of second instance, a deposition, made under oath by the captain of the *Haelen* before the district court in Rotterdam, is presented, in which the allegations made the basis of the appeal are corroborated.

The imperial commissioner before the superior court has moved that the appeals may be dismissed.

In the decision from which appeal is made, the judge of first instance goes upon the assumption that the steamer *Haelen*, as incontestably enemy-owned, was subject to capture unless the protection of article 6c of the Prize Code is to be accorded it. The latter would follow of necessity, if the vessel, in the prosecution of the voy-

age in question, was charged with a philanthropic mission. The prize court assents to this proposition, provided that the sole purpose of the *Haelen* was to convey a cargo of wheat to Rotterdam for the Commssion for Relief in Belgium, which would inure to the benefit of the civil population of Belgian and French occupied territory. It further assumes that by the mere fact of having traversed the war zone, the ship did not forfeit the protection of article 6c of the Prize Code, because the proclamation of a part of the North Sea as a blockaded area made no change in the prize provisions, and, specifically, created no new grounds for seizure in prize. The vessel only forfeited the protection of article 6c of the Prize Code if in addition to its declared philanthropic mission, it was pursuing other purposes in traversing the barred zone, especially if it intended to collect certain information for the enemy. That such was the intention of the captain of the *Haelen* in the present case, the judge of first instance regards as proved on the basis of the ascertained facts, without, however, specifying what definite belligerent purpose the vessel was pursuing by its voyage through the war zone. His main argument is that it is not evident what other reason could have induced the captain to expose his vessel to the great danger involved in traversing the barred zone, as his statement that he was forced to do so on account of heavy weather assumed, in view of the ascertained condition of the weather, the guise of a pure evasion; just as his behavior after the capture revealed his conscious guilt.

Philanthropic mission.

War zone.

The imperial superior prize court can not join in these considerations. It may be conceded to the judge of first instance that if the captain of the *Haelen* intended to assist the enemy's conduct of the war, his vessel would have lost the protection of article 6c of the Prize Code on this ground alone. But sufficient basis for such a conclusion is not given.

The statements of the captain are certainly not calculated to justify the voyage of the vessel. He may in truth have had sufficient reason for not making his way *north* of the Faroe Islands, as had been prescribed, for otherwise he would have exposed his vessel to the full lateral force of the northwesterly storm, which manifestly prevailed at the time he approached the Faroe Islands. The vessel was not very seaworthy in heavy weather, and was listing badly besides. But the situation

Deviation from course.

changed when he reached the southern point of the Faroe Islands. With the diminishing wind it was now possible to steer to the northeast under the protection afforded by the islands to the northwest, and thus even now avoid the barred zone. For, as the map with the records shows, there is between the southern point of the Faroe Islands and the edge of the barred area an adequate passage open to traffic. In neglecting to take this route, and even on the following day making no attempt to get out of the barred zone by a northerly course, but, on the contrary, continuing his course from the southern tip of the Faroe Islands in an easterly and southeasterly direction, the captain was no longer compelled by necessity so to do, but was acting according to his voluntary decision. The motive behind this, however, does not need to be regarded in the light of espionage, which under the circumstances is highly improbable. A much more proximate cause was the wish to shorten the voyage, and the southern tip of the Faroe Islands once reached, to avoid the circuitous route around the war zone, undesired from the beginning on account of the condition of the vessel. In another case, the captain of a relief ship met in the barred zone frankly gave as the reason for his course of action that he thought he "would get by once again." A similar thought may have determined the captain in this case. Looked at from this point of view, the subsequent conduct of the captain is explained. For, after he had, by his inconsiderate act, exposed the vessel intrusted to him to the serious risks of the war zone, contrary to his instructions, it was to his own interest to destroy evidence which would have incriminated him even in the eyes of those by whom he was commissioned. Specifically, the destruction of the log, containing the record of his course, the erasure of the course from the map, and the expression of the wish that the vessel might strike a mine, are explicable on this theory. If he had really made any observations of value to the enemy, that he should have entered these in his log, as the judge of first instance surmises, is highly improbable. In that case, moreover, he would doubtless have destroyed the book, even before the visiting officer came on board. Then, too, the latter, who examined the log, noticed no entries of this sort.

Suspicious conduct of captain.

If, in accordance with what has been said, the conclusions which the judge of first instance draws from the behavior of the captain do not appear valid, the judg-

ment itself must be sustained on a different ground. The latter concerns the point of departure of the argument of the prize court, according to which, navigating within the war zone, in and of itself, had no influence upon the application of article 6c of the Prize Code. This view can not be concurred in.

Eleventh Hague convention.

The provision of article 6c is borrowed from Convention XI of the Hague conference. It is based upon a proposal of the Italian delegate, which originally contained two clauses. The first of these set up the principle later adopted in the convention, while the second contained a provision that the enemy state which wishes to set forth a vessel for the purposes alluded to must notify its opponent to that effect. On his part, the latter must grant a safe conduct, in which he must specify the conditions under which he will grant the vessel this privileged treatment (*"indiquant les conditions de l'exemption"*).

The ninth session of the *Comité d'examen* dealt with the proposal. That the general principle required certain restrictions, such as had found expression in the proposal of the Italian delegate, met with no opposition. Difference of opinion arose only as to the formal requirement of a safe conduct, and as to the consequences if the vessel had not obtained one.

Under these circumstances, the fact that finally only the clause expressing the general principle was incorporated into the convention does not justify the assumption that it was intended to deny the competence of the belligerent state to specify in detail the conditions under which it would concede to the vessels concerned the privilege assured to them in the convention. As a matter of fact, the unlimited application of the general principle would lead to untenable consequences. If, for instance, one were to regard it as sufficient that a ship be conveying food to the inhabitants of occupied territory, in which scarcity of food prevailed, the necessary consequences would be that one would have to give safe passage to enemy vessels as well, if they were conveying necessities of life to the enemy's territory under the same assumptions. This proves that the principle can not have been conceived as broadly as might be assumed from the wording. On the contrary, the idea which was put forward in the deliberations, to wit, that the application of the general principle requires greater precision in special cases, must be regarded as applicable especially in the

case of vessels which, like the one in question, are dedicated to philanthropic missions only during the war, occasionally, and not permanently even in time of peace.

English decisions.

English decisions also take this point of view. A German vessel engaged in taking women and children from the fortress of Tsingtau to Tientsin was seized as prize. The prize court in Hongkong held the capture was legal, adopting the opinion that the vessel was not charged with a philanthropic mission in the sense of article 4 of the eleventh Hague convention. If, so the court reasoned, such a situation was meant to be covered by the Hague convention, the provision in question would not be couched in such vague and indefinite terms. On the contrary, such a contingency would have been provided for expressly and unambiguously. Were one to put as broad a construction on the expression "philanthropic mission" as did the plaintiff, it would lead to serious consequences, which could not possibly have been intended by the wording of the article. (Cf. case of the *Paklat*, 1 Trehern, British and Colonial Prize Cases, 515.) Thus, the English courts, too, adopt the view that an unlimited application of that general principle, at least as regards enemy ships, is not within the meaning of the provision.

As a matter of fact, then, shipping for the relief commission takes place not only under the protection of article 6c of the Prize Code, but on the basis of an agreement between the German Government and the interested neutrals, which is embodied in the safe conduct which every relief ship must have with it on both the outbound and return voyage. In this safe conduct, several conditions are set up, whose fulfillment is designated as the premises of preferential treatment. Moreover, it contains a clause to the effect that the safe conduct has reference solely to the high seas outside of the war zones. In view of the history of the origin of article 6c of the Prize Code given above, it must be assumed that vessels which, contrary to prescriptions of their safe conduct, traverse the blockaded areas, not only expose themselves to the danger of destruction connected therewith, but forfeit the benefit of article 6c of the Prize Code as well.

Conditions of safe passage.

Since, as has been shown, the captain of the *Haelen* was not compelled by any urgent necessity, tantamount to *force majeure*, to traverse the barred zone, he has

forfeited the right to special treatment, in accordance with what has been said of this claim. Therefore, his vessel, together with its cargo, is subject to the general provisions of prize law, namely, inasmuch as both were admittedly of enemy ownership at the time of capture, condemnation. Notwithstanding this, the major part of the cargo, as the records show, and as substantiated by the representative of the Commission for Relief in Belgium, has in the meantime been restored to the commission. Whether grounds of equity argue in favor of extending this concession to the rest of the cargo as well is a question which does not lie within the competence of the prize court, but is rather to be decided by the proper authorities of the Government.

The judgment is therefore affirmed. The decision on the question of costs is conditioned by section 37 of the prize court rules.

THE "WAUBESA"

(American Maritime Cases, 1923, p. 659)

United States of America, as owner of steamship *Waubesa*, libellant, *v.* City of New York, as owner of ferries *Queens* and *Mayor Gaynor*, respondent, and cross libel, etc.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

May 3, 1923

Statement of the case.

AUGUSTUS N. HAND, D. J.: This case involves a collision between the steamship *Waubesa*, belonging to the United States, and the ferryboats *Queens* and *Mayor Gaynor*, belonging to the city of New York. The collision occurred on March 17, 1919, in New York Harbor, during a dense fog. The *Waubesa* was anchored at or near the anchorage grounds in the upper bay to the southwest of Bedloes Island.

The United States appeared specially and filed a plea to the jurisdiction to the effect that the *Waubesa* was not employed as a merchant vessel but was engaged in the European food relief service, which is alleged to be a purely governmental function.

Libels.

In the first libel the United States sues to recover for damages caused the *Waubesa* by the collision, and the city of New York files a cross libel alleging that the collisions were due to the negligence of those in charge

of the *Waubesa* in that the latter was anchored in the channel way and in that she did not ring her bell as required by law so as to notify vessels of her position at anchor.

The second libel is filed by the Grain Corporation against the city of New York, and alleges that the libellant shipped on board the *Waubesa* grain in good order and condition to be carried from New York to European ports, that the *Waubesa*, with libellant's cargo on board, took up anchorage on the general anchorage grounds at a point to the south and east of the Statue of Liberty in New York Harbor, where the municipal ferries *Queens* and *William J. Gaynor* negligently collided with her, to the damage of the merchandise belonging to the Grain Corporation. The city of New York impleaded the United States as the one primarily liable, claiming the right to sue it under the provisions of the act of March 9, 1920.

In the third libel, the United States Grain Corporation, organized under the laws of the State of Delaware, alleges that the *Waubesa* was a general ship engaged in the common carriage of merchandise by water for hire and was being operated under the control and direction of the United States Shipping Board Emergency Fleet Corporation; that the Grain Corporation shipped rye grain on the *Waubesa* in good order and condition to be carried from Philadelphia to Falmouth, England; that the *Waubesa* instead of proceeding to Falmouth, put in to the port of New York, having oil and water in the bilges, and being in such a condition that it was deemed best by those in charge of her not to proceed upon her voyage to Falmouth; that the cargo of grain was discharged in the port of New York not in good order and condition as when shipped, but seriously injured and damaged by contact with fuel oil and sea water, for all of which damages are sought. The United States is made respondent under the act of March 9, 1920, in place of the *Waubesa* and the Emergency Fleet Corporation, and the city of New York is impleaded under the admiralty rule on the ground that it is primarily responsible for the alleged damage.

[The court here reviews the evidence upon the question of liability for the collision and concludes that the city of New York is liable owing to the fact that the ferryboats which struck the *Waubesa* were being navigated

in the fog at an improper speed, estimated as 7 to 8 knots.]

The claim that the city of New York can not limit its liability because its regulation for the municipal ferries contravened the inland rules seems to me without merit. Regulation 26 reads as follows:

Regulations.

"In a fog, mist, falling snow, or heavy rainstorms, boats must run at half speed, or less, having careful regard to the existing circumstances and conditions. If the weather is so thick or foggy that the regular advertised schedule can not be maintained with safety to the ferryboats they will be run slowly and cautiously without regard to the schedule and proceed with great care and caution."

Article 16 of the inland rules says:

"Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions."

It is contended that the words "boats must be run at half speed or less" suggest running at half speed under unsafe conditions. I see no ground for this. Each regulation prescribes a caution and a limitation of speed dependent on the circumstances. It might as well be argued that the municipal regulation imposed greater moderation rather than less. In my opinion the two regulations are equivalents. There is no proof that the city rule was not made in good faith. The words of the Supreme Court in *La Bourgoyne*, 210 U. S. at p. 126 are applicable:

"* * * The petitioner having shown the promulgation of regulations for the conduct of its business, which exacted a compliance by the captains of its vessels with the international rules, we think the burden of proving that the rules were not promulgated in good faith or that a willful departure from their requirements was indulged in, and was brought home to or countenanced by the petitioner, was cast upon the claimants, and that the court properly held that that burden was not sustained by the evidence."

In my opinion the municipal regulations, while differently phrased, were in entire accordance with the inland rules, and the city sustained the burden imposed by law of proving the absence of privity in respect to undue speed in a fog.

Seaworthiness.

The Grain Corporation contends that the ship was unseaworthy because oil leaked from the tank and got into the grain and that for this reason the exceptions in the bill of lading and under the Harter Act are not applicable.

[The court here reviews the evidence upon this point, and concludes as follows:]

It seems clear, therefore, that oil which had leaked from the tanks caused the damage in holds 1 and 2, and that the collision and the resulting beaching of the vessel contributed to this damage.

The suit by the Grain Corporation against the United States is for failure to deliver the grain shipped and receipted for in good order in accordance with the terms of the bill of lading. As Goble, the master (deposition, p. 13) and Glen, the inspector for the United States Shipping Board (minutes, p. 82), both said, the trip was really a trial trip, though the voyage for which the cargo was shipped was from Philadelphia to Falmouth. The vessel left Philadelphia with oil in her bilges under the protest of her engineer, and in substance that of her master also (Goble deposition, p. 8). The soundings, however inaccurate, showed a large amount of oil in her bilges, and this oil, when the vessel listed as a result of the accident, damaged the grain in holds 1 and 2. It seems clear that the vessel should not have left Philadelphia under such circumstances and that she was unseaworthy for the carriage of grain. Moreover, the

Deviation.

trial trip was a deviation by an unseaworthy vessel that deprived the *Waubesa* of the benefit of the exceptions in the bill of lading and the provisions for exemption of the Harter Act. *The St. Paul* (1921), 277 Fed. 99; *The Elizabeth Dantzler* (1920), 263 Fed. 596. The *Waubesa* was not definitely proceeding on her voyage, but only going to New York and then on in case she was found fit and after she was satisfied that the oil could be pumped out and did not imperil the cargo. New York was not a port of refuge, but a stopping place for convenience on a trial trip, which, irrespective of the delay caused by the collision, proved to be a stopping place of long duration because of the condition of the vessel. I can hardly see a more fit application for the doctrine of deviation.

Liability.

Under such circumstances if the vessel were not Government owned the Grain Corporation could recover damages to her cargo and the owner of the *Waubesa*

would have the right to recover over from the city of New York the total damages to the grain caused by water in holds 4 and 5 and one-half of damages caused by oil in holds 1 and 2. The city could limit in all cases.

The United States has filed exceptions to the jurisdiction because:

(1) The *Waubesa* was not employed as a merchant vessel, but was engaged in public business;

(2) The libel is for the sole benefit and account of private underwriters;

(3) The policies of insurance issued by underwriters were issued to an agency of the United States. Hence the underwriters are not in a position to sue; Jurisdiction.

(4) Any money paid by underwriters should inure to the benefit of the United States.

In order to establish that the *Waubesa* was not employed as a merchant vessel, but was engaged in public business, counsel for the United States has introduced documentary proof that the Grain Corporation was incorporated by the United States in pursuance of an Executive order and that by Executive orders the President managed the corporation and arranged for an increase and decrease of its capital stock; that the Government owned the stock of the corporation and that by Executive order its liquidation was provided for and the assets were to be paid into the Treasury of the United States. The Government also showed that the Grain Corporation in delivering the grain shipped on the *Waubesa,* which was shipped under a bill of lading providing for delivery to the order of the United States Grain Corporation, care of American Embassy, London, was really engaged in the relief of the starving countries in the East and not in mercantile business. The case of *The Western Maid* (1922), 257 U. S. 419, is relied upon. That vessel, like the *Waubesa,* was owned by the United States and was engaged in transporting foodstuffs for the relief of the civilian population of Europe. The Supreme Court said (Mr. Justice Holmes writing for the majority, p. 431): Public business.

"* * * It is suggested that the *Western Maid* was a merchant vessel at the time of the collision, but the fact that the food was to be paid for and the other details adverted to in argument can not disguise the obvious truth, that she was engaged in a public service that was one of the constituents of our activity in the war and its

sequel and that had no more to do with ordinary merchandizing than if she had carried a regiment of troops."

The same view was taken by the Supreme Court in the recent case of *United States Grain Corporation* vs. *Phillips*, 1923 A. M. C. 312, 43 Sup. Ct. Rep. 283, 67 L. Ed. 342, Feb. 19, 1923, where a naval officer carried gold from Constantinople to New York on the steamship *Laub*, a destroyer in the Navy. This gold was being forwarded on the *Laub* in payment by Bulgaria for wheat furnished by the Grain Corporation, and the captain of the *Laub*, under a statute applicable to shipments by private persons or corporations, claimed a commission for the carriage of the gold. The court said that in substance the gold was the property of the United States and while the legal title was in the Grain Corporation and the property of that corporation might have been taken to pay a judgment rendered against it, yet the property was clothed with such a public interest "that the transportation of it no more could be charged for by a public officer than the carrying of a gun, we must look not at the legal title only but at the facts beneath forms."

The counsel for the Grain Corporation endeavors to distinguish these cases on the ground that in the case at bar the Grain Corporation employed its own assets in purchasing the grain instead of carrying grain as in the *Western Maid* purchased with funds appropriated directly by Congress; that it also insured the grain, as is not done in a direct government transaction, and paid freight to the *Waubesa* and received bills of lading therefor. The proof shows, however, that the object of the governmental activities was the relief of Europe and that any profit over cost which the Grain Corporation may have made was only for the purpose of paying interest on moneys advanced to purchase supplies to relieve the famine-stricken countries. I can not regard the distinctions as sufficient to take the case out of the sweeping decisions in *The Western Maid* and *United States Grain Corporation* vs. *Phillips, supra.*

Insurance.

Advances by the underwriters to cover damage to the grain cargo have been made in consideration that "best endeavors to recover the value of the flour * * * from any and all persons and corporations who may be liable therefor" would be exercised. Such a clause can not, however, create a right on the part of the Grain Corpora-

tion against the United States when the latter has not by appropriate legislation consented to be sued. The *Western Maid* and the case of *United States Grain Corporation* vs. *Phillips* preclude any such result. Whether or not the warranty in the insurance policies that the insurance shall not inure directly or indirectly to the benefit of the carrier is sufficient to avoid the insurance in this case because of the fact that the United States Grain Corporation, as well as the United States Emergency Fleet Corporation, really belong by reason of stock ownership to the United States, is not a matter for determination in this litigation. I can not see that these warranties, or the clause in the loan receipts that "the Grain Corporation shall use its best endeavors to recover the value of the flour * * * from any and all persons and corporations who may be liable therefor * * *" can affect the rights of the parties here.

While it is true that if the *Waubesa* had under the meaning of the decisions been a "merchant vessel" the damages suffered by the Grain Corporation would have been divided as between the city of New York and the United States, yet the Grain Corporation itself would have been entitled to recover the whole of its damages against either wrong doer. *The Beaconsfield*, (1895) 158 U. S. 303. The English rule that owners of the cargo could only recover one-half of their damages from each party does not apply in our courts. *Ralli* vs. *Societa Anonima di Navigazione* (1915), 222 Fed. 944, at page 998. Inasmuch, however, as neither the United States nor the *Waubesa* are liable to suit, the Grain Corporation may prove its full damages against the city of New York subject to the right of the latter to limit. In proof of its claim against the surrendered vessels, or their proceeds, the claim for damages of the United States for injuries to the *Waubesa* should be deferred to the claim of the Grain Corporation since the *Waubesa* was unseaworthy and guilty of a deviation. *The George W. Roby*, 6th C. C. A., 1901, 111 Fed. 601.

Decision.

In the first libel an interlocutory decree is granted to the United States against the city of New York with right of the latter to limit damages to proved value of surrendered vessels. The cross libel of the city of New York against the United States of America is dismissed for want of jurisdiction.

In the second libel brought by the United States Grain Corporation against the city of New York, an interlocutory decree is granted to the libellant, with the right to the city of New York to limit the amount of damages to proved value of the surrendered vessels. The petition impleading the United States of America is dismissed for want of jurisdiction. There are two claimants to the same fund in the foregoing libels, namely, the United States and the United States Grain Corporation, and the causes have all been tried together. For the reasons hereinbefore stated the claim for damages of the United States for injuries to the *Waubesa* should be deferred to the claim of the Grain Corporation since the *Waubesa* was unseaworthy and guilty of a deviation.

The third libel brought by the United States Grain Corporation against the United States of America is dismissed for want of jurisdiction and the petition by the United States of America impleading the city of New York is dismissed.

Settle decrees on notice.

THE "CONNER"; THE "ESPERANZA"

(American Maritime Cases, 1924, p. 1170)

New York & Cuba Mail Steamship Co., libellant, *vs.* United States of America, respondent, and cross libel

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

July 29, 1924

WINSLOW, D. J.: These are cross suits in admiralty—one brought by the New York & Cuba Mail Steamship Co., owner of S. S. *Esperanza*, against the United States, owner of the torpedo-boat destroyer *Conner*, and by the United States against the S. S. *Esperanza*, to recover damages arising from a collision between the *Esperanza* and the *Conner* on February 15, 1918, off Barnegat.

By act of Congress approved February 28, 1923, jurisdiction was conferred upon this court to hear and determine the suit and to enter a judgment or decree "upon the same principles and measures of liability as in like causes in admiralty between private parties." (67th Cong., Private Act No. 192.)

The facts material to the determination of the issues, not disputed, are as follows:

Facts of the case.

The *Esperanza*, with passengers and cargo, left Brooklyn at 3.05 p. m., February 14, 1918, bound for Cuban and Mexican ports. At 7.55 she passed Scotland Light, her course being S. by W. ½ W. This course was maintained until off Sea Girt, when it was changed to S. by W. ¼ W., and later was changed to S. by W. At 10.25 p. m., the weather having thickened, the engines were put half speed and fog signals were sounded at regular intervals. At 10.30 fog shut in and speed was reduced to slow. About 10.40 the speed was reduced to dead slow—3 to 4 knots, "just steerage way." The *Esperanza's* fog whistles, in the meantime, were blown at regular intervals. At 12.08 a. m., February 15, ship's time, while running at dead slow on a course S. by W., the fog signal of another vessel was heard about three points on the starboard bow of *Esperanza*. The master and second officer were on the bridge and a lookout stationed on the forecastle head. The fog signal was heard and reported by the lookout, whereupon the *Esperanza* blew a regular blast of her fog whistle. The captain then took the whistle cord and blew three fog whistles at approximately three-quarter minute intervals. No whistle was heard from the *Conner* during this time. Then a loud whistle was heard from the *Conner* and, at the same time, she broke out of the fog, apparently coming at high speed and almost immediately struck the *Esperanza* a glancing blow on her starboard side, thence disappearing in the fog under the *Esperanza's* stern. An inspection disclosed that the *Esperanza* was able to make port without assistance and she put about, heading toward New York, where she arrived February 15, at 12.32 p. m.

The *Conner*, a new torpedo-boat destroyer, left Philadelphia February 14, 1918, for Newport, R. I., under orders to make test runs of 12.16, and 20 knots, using the cruising combination of her turbines. Ten minutes prior to the termination of the 12-knot test, at 9.30 p. m., February 14, a dense fog shut in, which continued until the collision. The 12-knot test was terminated at 9.40 p. m., when the engines were shifted to high-pressure combination, but no change was made in the *Conner's* speed of 12 knots.

The *Conner* passed Five Fathom Bank Lightship at 7.20 p. m. about 100 yards on her port beam. From there her course was made at 34° true. Her course and

speed of 12 knots were held until the collision occurred. The *Conner's* commander testified that at 12.12 a. m. February 15:

Testimony of *Conner's* Commander.

"I heard a sound * * * This sound attracted my attention on the ground that it might be a fog signal. I inquired and found no one else on the bridge had heard anything which sounded like a fog signal. I gave immediate orders to exercise unusual diligence in listening and to sound our own signal, so that if this sound had been a fog signal we would have given an immediate response to the other vessel. Our signal had just been sounded when, through the fog, came a loud, piercing fog signal of a steam vessel under way on our port bow. I immediately called out 'Stop the engines' and, being the nearest person to the engine-room telegraph shoved them myself to the stop position and got the stop signal back from the engine room."

The commander further says that—

"The only thing which was seen at first was a string of white lights, nothing to indicate the heading of a vessel or her character."

He thereupon ordered "hard right" to the steersman and—

"just after that a green light appeared close under the bow and the *Conner* struck a glancing blow against some large vessel."

It may be noticed that the *Conner's* engines were ordered stopped and her helm put "hard right" before either of the *Esperanza's* side lights came into view. The engines were not reversed nor her headway checked and she continued on, striking the *Esperanza* on the starboard side, glancing off and passing under the *Esperanza's* stern and disappearing in the fog.

The litigants do not agree as to the place of the collision. The commander of the *Conner* fixes it at about 12 miles from Barnegat buoy. The *Esperanza* fixes it at 3 miles southeast of Barnegat buoy.

Owing to the fact that no suit could be brought, due to lack of the court's jurisdiction, until after the act of Congress some five years after the collision, the depositions could not be taken earlier. Owing to the lapse of time, only two depositions of *Esperanza's* witnesses were produced—that of the master of the *Esperanza* and of the second officer, both of whom were in extremely feeble health. There was also received in evidence, how-

ever, the record of the proceedings of the investigation on board U. S. S. *Arkansas*, February 16, 1918, made pursuant to order of the commander of the Battleship Force 2, United States Atlantic Fleet. There is also in evidence the record of the investigation held by the Steamboat Inspection Service at the office of the local inspectors in New York on February 28, 1918.

In determining the question of responsibility, the conduct of each vessel will be considered separately. The International Rules adopted for the purpose of preventing collisions provide that the regulations to that end "shall be followed by all public and private vessels of the United States upon the high seas."

International rules.

"ART. 16. Every vessel shall in a fog, mist, falling snow, or heavy rainstorm, go at a moderate speed, having careful regard for the existing circumstances and conditions."

That these rules govern the navigation of a war vessel in time of war has been distinctly held by this court.

Watts vs. *U. S.*, 123 Fed. 105. This case arose out of a collision between the U. S. S. *Columbia* and the *Foscolia* during the Spanish-American War. It was contended that the *Columbia* was proceeding at an immoderate speed in fog, the speed, however, being 6 knots. The Government contended that the failure of a war vessel to obey the navigation rules during war time was excusable. The court refused to agree with this contention. In the act which authorized the present suit it is provided, among other things, that the issues shall be determined "upon the same principles and measures of liability as in the cases in admiralty between private parties."

The *Conner* was under a duty to observe the rule as to moderate speed in like manner as a privately operated ship in the admittedly dense fog.

In a recent case, in which Judge Ward wrote the opinion, not yet reported (*N. Y. & Porto Rico S. S. Co.* vs. *Director General*, June 3, 1924) the definition of a dense fog is given as the obscuration of objects 1,000 feet away or less.

Some evidence in the instant case is that the fog was so thick that the lookout on the *Conner's* bow could not be seen from her bridge 50 feet away. Commander Howe, a most excellent witness, described the visibility as "between 50 and 100 yards."

"Moderate speed."

What is a moderate speed, is of course a relative term, but it has been the subject of frequent comment and determination.

The Colorado, 91 U. S. 692, 702; *The Nacoochee*, 137 U. S. 330, 339.

Mr. Justice Brown, in *The Umbria*, 160 U. S. 404, stated the rule as follows:

"The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law."

And, again, in *The Chattahoochee*, 173 U. S. 540, Mr. Justice Brown again referred to the rule, using the following language:

"No absolute rule can be extracted from these cases. So much depends upon the density of fog and the chance of meeting other vessels in the neighborhood, that it is impossible to say what ought to be considered moderate speed under all circumstances. It has been said by this court in respect to steamers that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law" (p. 548).

Ordinarily, it would hardly be debatable that a speed of 12 knots in a fog of the density which prevailed at the time of the collision in the instant case would be wholly unwarranted and immoderate. Indeed, many times this court has held that a very much less speed than 12 knots is an immoderate speed.

The Columbia (*supra*); *The H. F. Dimock*, 77 Fed. 226; *The Hilton*, 213 Fed. 997; *The Rosaleen*, 214 Fed. 252.

The Government contends, however, that the *Conner* was justified in proceeding at 12 knots because of her tremendous backing power, which would enable her to stop in a shorter distance than ordinary vessels. Her maximum speed was upwards of 30 knots. It is quite apparent that, whatever the backing power of the *Conner* may have been, it was of no avail here. That speed in this dense fog brought her into collision in a few seconds, before her engine power could even be brought into play. The distance that the ships were visible to

each other in the fog and the speed at which they were approaching and traversing the space between them are the real factors in the present problem. How futile is engine power in stopping or reversing if the colliding vessels are upon each other in a few seconds of time before the power can be brought into play!

In *The Manchioneal*, 243 Fed. 801, the Circuit Court said:

" * * * Speed is always excessive in a vessel that cannot reverse her engines and come to a standstill before she collides with a vessel that she ought to have seen, having regard to fog density." (Citing cases.)

In *The Haven*, 277 Fed. 957, the court said:

"A vessel navigating in a fog must go no faster than will permit her to stop within the distance she can see ahead" (p. 959).

In *The City of Norfolk*, 266 Fed. 641, the court said:

"In such navigation 'moderate speed' means speed so slow that a vessel can be stopped within the distance at which another vessel can be seen."

At the rate of 12 knots, the *Conner* was making approximately 1,300 feet per minute, or 300 feet in about 15 seconds. According to the witnesses, the boats, when visible to each other, were at most not over 150 to 300 feet apart. According to the commander's testimony, it would have been impossible to stop the *Conner's* speed of 12 knots at the point when they became visible. It may be speculation to endeavor to estimate what might have been done had the *Conner* been proceeding slower, but we are dealing with what actually happened at a speed which the court believes was highly excessive under the circumstances with the known result.

In the case of *Watts* v. *U. S.* (*supra*) the warship *Columbia* was proceeding at about 6 knots per hour. The vessel with which she collided, the *Foscolia*, was not seen by anyone on the *Columbia* until she was within 75 yards.

The *Esperanza* claims that the *Conner* was further at fault in failing to obey further provisions of article 16 of the International Rules, wherein it is provided that—

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over."

This rule is, of course, applicable to the *Esperanza*, as well as to the *Conner*. In view of the excessive speed of the *Conner*, which I believe was the proximate and contributing cause of the collision, the *Experanza's* failure to wholly stop her engines recedes in importance. It is not clear that the *Conner* heard the *Experanza's* first fog signal, although the commander says he heard a sound he thought might be a fog signal. Although his sense of hearing indicated that it might be a fog whistle, no change of speed took place. In *Lie* v. *San Francisco & Portland S. S. Co.*, 243 U. S. 291, the master of the *Selja* attempted to excuse his failure to stop as required by article 16 by saying that when he first heard the faint signal from the approaching vessel he thought it might be a foghorn on the shore. The court, however, overruled the *Selja's* contention and held that the provisions of article 16 were mandatory and required all vessels to stop their engines immediately. The same argument, however, as to the duty of the *Esperanza* might be applied to her, unless the circumstances of the case do not so admit. Neither of the navigators was free to substitute his judgment for the positive requirements of the rule. A former navigation rule vested the navigator with a degree of discretion. The present rule is mandatory and is positive law. It is also true that the position of a vessel whose fog signal is heard must be ascertained before proceeding. Three elements are involved, indeed, before proceeding—bearing, distance, and course. Whatever we might say, however, in regard to the duty to stop, it seems to me that the paramount negligence—indeed, the proximate cause, of the collision—was the excessive speed of the *Conner* and her failure to observe the rule regarding speed in fog. It is admitted by the commander of the *Conner* that had her speed been 4 knots, the collision would not have occurred. The 12-knot speed had continued for quite a time before the collision, and brought her swiftly to the point of collision.

Mandatory rule.

In view of the court's conclusion, I do not deem it necessary to consider the question as to whether the *Conner* was at fault for changing her course before the position and course of the *Esperanza* had been ascertained. The commander of the *Conner* hard aported his helm as soon as the *Esperanza's* "string of lights" broke into view, and he admitted that in so doing he "gambled" on the *Esperanza's* course. However, I think it is proper

to conclude that the error, if it was error, was committed at the moment of collision and may be regarded with less strictness than one committed when the vessels are more distant from each other. In like manner, reference might be made to the alleged contention that the *Conner* was at fault for failing to reverse her engines. This contention, however, is of interest more particularly because the *Conner* contends that she was justified in maintaining a speed of 12 knots, because of her tremendous backing power. That tremendous backing power—which was not exercised at the moment of crisis—disposes of the argument that the speed was excusable. The potential power was neither brought into play, nor in all human probability could it have had any effect in avoiding the collision, if used. In considering the responsibility of the *Esperanza*, the court does not deem it necessary to consider the charge that she was navigated by persons not wholly competent. The evidence is to the contrary, and this contention requires no consideration; but the question as to whether or not the *Esperanza* should have stopped her engines when she heard the fog signal of the *Conner* requires consideration.

For more than an hour prior to the collision the evidence satisfies the court that the *Esperanza* had been making perhaps 3 knots, which was barely steerageway. Not only was that the testimony of the *Esperanza's* witnesses, but it is also supported by the *Esperanza's* engine-room slate. "The ship was turning over just as slow as the engine can be turned."

Burden.

Assuming that the burden also rests upon the *Esperanza* of showing not merely that her failure to stop her engines when she heard the signal of the *Conner* might not have been one of the causes, or, rather, that it could not have been one of the causes of the collision, the record convinces me that that burden has been sustained. Had she stopped her engines, she would have lost steerageway entirely and "could not have been maneuvered." The failure of the *Esperanza* to stop her engines, assuming that it was her duty so to do, could not have been one of the causes of the collision. It was the gross negligence on the part of the *Conner* which accounts for the collision. In *The City of New York*, 147 U. S. 72, at p. 85 Mr. Justice Brown said:

"Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself

sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel."

The *Conner* did not stop her engines when the commander "thought" he heard a whistle when proceeding at 12 knots, nor yet did he reverse his engines at any time either before or after the *Esperanza* became visible. He did, however, change his course. It now appears that had the rudder been put over exactly the opposite way, it would have "worked out better," as the commander said. However, these acts were done *in extremis*, and ought not to be considered faults of navigation.

Judgment.

The excessive speed of the *Conner*, particularly in its relation to the bare steerageway of the *Esperanza*, leads me to the conclusion that the total stoppage of the *Esperanza's* engines would not have prevented the collision, nor yet did that failure on her part in any way contribute to it. The *Esperanza*, at her speed, would have moved a negligible distance in the time that the *Conner* would have traversed a very considerable distance. The relation between two moving objects with differences of speed such as those two vessels is similar to the relation of an almost stationary object and a moving object.

The negligence of the *Conner* continued to operate as an efficient cause until the moment of the collision.

The libel of the United States against the S. S. *Esperanza* should be dismissed, with costs, and a decree will be entered in favor of the libellant.

THE "MUDROS"

May 2, 1918

(2 Entscheidungen des Oberprisengerichts in Berlin, 87)

In the case of the steamer *Mudros* the imperial superior prize court, in its session of May 2, 1918, has decided that the complaint of the imperial commissioner in Hamburg against the decree of the prize court of that place of May 18, 1917, must be rejected as inadmissible.

Reasons:

Statement of the facts.

The steamer *Mudros* was before the war a German merchant vessel and was lying in an Italian port at the time when Italy entered the war. The Italian Government later requisitioned the vessel and handed it over to the Italian State Railways for their use. It sailed under

Requisition by foreign government.

the Italian flag, and on such a voyage was sunk in mi ocean by a German submarine. The case came before the prize court in Hamburg, which denied its competence inasmuch as it lacked proof that the vessel had lost its German character.

The judgment itself is to the point even if the considerations noted, upon which it rests, can not be concurred in. The *Mudros* should have been regarded as a public vessel of Italy at the time of sinking, and should have been treated accordingly. In accordance with Article 2 of the Prize Code, vessels employed in services of the state, under the control of the state, are reckoned as public vessels, and public vessels of the enemy are forfeited without further formality under the laws of war. The suppositions mentioned were present in the case of the *Mudros*, she having been requisitioned by the Italian Government and employed for purposes of state under the Italian flag. On *this* ground, overtures for judicial proceedings before the prize court must in truth be refused.

Public vessel.

The complaint of the imperial commissioner, therefore, requires no actual change in the decision attacked. Inasmuch, however, as the prize court rules only take cognizance of judicial methods by which a decision as such can be attacked, the complaint must be rejected.

THE "SAO VICENTE"

(295 F. 829)

Transportes Maritimos Do Estado *v.* T. A. Scott Co. (Inc.)

CIRCUIT COURT OF APPEALS, THIRD CIRCUIT

January 9, 1924

WOOLLEY, Circuit Judge: The question brought here on this appeal, broadly stated, is whether the District Court lost its jurisdiction in admiralty on a suggestion of immunity of a foreign sovereign from suit. The general rule exempting a government, sovereign in its attributes, from being sued without its consent is not disputed. *Porto Rico* v. *Rosaly*, 227 U. S. 270. The real question in the case is whether the sovereign, under the circumstances, gave or withheld its consent.

The steamship *Sao Vicente* stranded on Packet Rock, Sconticut Point, Mass. She was floated and delivered at New Bedford by the T. A. Scott Co. Later she made

Statement of facts.

her way to New York Harbor where, incurring debts for repairs and supplies and failing to pay them, she was arrested under several libels filed in the District Court of the United States for the Southern District of New York and under this libel filed in the District Court of the United States for the District of New Jersey. Being represented in several suits by the same proctors who pursued in each suit the same line of defense, the proceedings in some of the actions are, in the main, the same, and, to a certain extent, the questions raised are likewise the same. Hence, we refer to the opinion of the Circuit Court of Appeals for the Second Circuit in *The Sao Vicente*, 281 Fed. 111, for a statement in detail of proceedings which, with the quoted pleadings, are, in a measure, similar, *mutatis mutandis*, to those in the case at bar.

We shall discuss the law applicable to the proceedings in the order in which they occurred.

On April 11, 1921, the T. A. Scott Co. filed a libel in the district court against the steamship *Sao Vicente* and Transportes Maritimos Do Estado for salvage services. Whatever may be the character of this body, there can be no doubt of the libellant's right to institute suit or of the jurisdiction of the district court initially to entertain suit against it. Nor did the Transportes Maritimos Do Estado question either this right of the libellant or the jurisdiction of the court just then, but appeared by its proctors and filed a claim of ownership in the usual form, concluding with a prayer for leave to defend the action (281 Fed. 112).

There was nothing said or done to indicate either the fact or purpose of a special appearance. Without doubt the claimant's appearance was general. Pursuant thereto, its proctors proceeded to a stipulation for costs, and to a stipulation for value in the usual form (281 Fed. 113), upon condition to "abide by all orders of the court, interlocutory and final, and to pay the amount awarded." Whereupon the ship was released from custody and she sailed away.

Claim of immunity.

On June 2, 1921, the claimant changed its proctors. On the same day its new proctor filed its answer, traversing none of the averments of the libel, but raising for the first time the defense that the ship is a Portuguese vessel owned and operated by the Transportes Maritimos Do Estrada, which is a department of the Republic of

Portugal; that it objects to and protests against the assumption of jurisdiction by the District Court in a suit to which the sovereign foreign government has not consented, maintaining that the settlement of the matter in dispute "should be left to the Portuguese consul at the port of New York." 281 Fed. 113.

The answer was verified by Prista, vice consul general for the Republic of Portugal at New York.

[1] Exceptions by the libellant to the claimant's answer were sustained by the District Court on the ground that the claimant had entered a general appearance, and, having submitted itself to the jurisdiction of the court, it thereby had waived any right to appear specially at that late day for the purpose of attacking its jurisdiction.

We think the court was right on two grounds: First, because a sovereign may waive its immunity, and it is considered to have done so when it has entered litigation with a general appearance and when, as here, it has acted for a time and in a manner entirely consistent with such an appearance. *Beers* v. *Arkansas*, 20 How. 527; *Clark* v. *Barnard*, 108 U. S. 436, 447; *Richardson* v. *Fajardo Sugar Co.*, 241 U. S. 44; *Porto Rico* v. *Rosaly*, 227 U. S. 270; *Porto Rico* v. *Ramos*, 232 U. S. 627; *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 284; *The Sao Vicente* (C. C. A.), 281 Fed. 111. We know of no more orderly way for a foreign government to consent to suit and submit to jurisdiction than by the voluntary act of entering a general appearance, and when this is followed by conduct permissible only under an appearance of that character, the sovereign must be held to have waived its immunity to suit. It will not suffice for it to change its attitude after the litigation is under way, for, as Mr. Justice McKenna, in the Ramos case, *supra*, said:

"The immunity of sovereignty from suit without its consent can not be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step."

[2] Second, we think the trial court was right in sustaining the exceptions to the claimant's answer for the added reason that the suggestion of immunity of the sovereign—itself insufficient in substance—was not made

through the proper official channels. It was made in the claimant's answer signed by its proctor and verified by the Portuguese vice consul general at the port of New York. That the public status of a ship can not be determined upon the mere suggestion of private counsel was decided in *ex parte Muir*, 254 U. S. 522, and that the consul general of the Republic of Portugal is not competent, merely by virtue of his office, to appear in court and claim immunity for his Government was decided in *The Sao Vicente*, 260 U. S. 151, on certiorari to the Circuit Court of Appeals for the Second Circuit, it being the case to which we have made frequent reference (281 Fed. 111). Lacking competency by virtue of his office to speak for his Government, there is nothing in the record which shows that the vice consul general was specially authorized by his Government to interpose a claim to immunity on its behalf. Therefore, on the record as it stood after the court had, without error, sustained exceptions to the claimant's answer by striking out the abortive suggestion of immunity of a sovereign, the claimant remained on the record in the situation in which it had placed itself by its general appearance. Thereupon the court entered an interlocutory decree and made an order referring the amount of salvage to a special commissioner. Here another substitution of proctors occurred.

The claimant did not introduce before the commissioner any evidence in opposition to the libellant's claim for salvage services, but presented to him an information, suggestion and petition of the Republic of Portugal for immunity from suit. This, very naturally, the commissioner refused to accept. From this point the case differs from *The Sao Vicente* (C. C. A.) 281 Fed. 111.

On January 24, 1923, the commissioner made a report awarding the libellant $50,000. No exceptions having been filed, the court, on February 20, 1923, affirmed the report and entered a final decree.

[3] On March 2, 1923, the proctor for the claimant left in the office of the clerk of the court an order for the allowance of an appeal and at the same time "left for filing in the office of the said clerk" the information and suggestion previously presented to the commissioner, signed and verified by his excellency, Jose d'Alte, envoy extraordinary and minister plenipotentiary of the Republic of Portugal, objecting to the exercise of jurisdic-

tion by the district court over the Transportes Maritimos Do Estado as an integral part of the sovereign Government of Portugal. As this information and suggestion had been signed and verified at Washington more than a month before the date of the final decree, and as it was brought to its attention for the first time 10 days after the date of the final decree, the District Court refused to regard it as having any bearing on the case. The claimant now maintains that the District Court erred in not opening the decree, accepting the suggestion, and yielding its jurisdiction. Without passing upon any question of error involved in the refusal of the court to open the decree and accept the suggestion, it is sufficient to say that, even if the court had done so, it would not have availed the claimant or the Republic of Portugal because the attempted suggestion was not conformable with the practice in such cases in that it was not presented through the proper official channels. (*Ex parte Muir*, 254 U. S. 522.)

The suggestion in the case at bar was presented by the Portuguese minister directly to the court. True, it was accompanied by a certificate of the Secretary of State to the effect that the minister whose name is subscribed thereto is duly accredited to this Government as envoy extraordinary and minister plenipotentiary of Portugal. As the Supreme Court said in *The Pesaro*, 255 U. S. 216, "while that established his diplomatic status it gave no sanction to the suggestion." This is particularly true in view of a footnote to the certificate of the Secretary of State that, "For the contents of the annexed document the department assumes no responsibility." In these circumstances "the libellants' objection that, to be entertained, the suggestion should come through official channels of the United States was well taken." *Ex parte Muir*, 254 U. S. 522; *United States* v. *Lee*, 106 U. S. 196, 209; *Societa Commerciale Italiana di Nav.* v. *Maru Nav. Co.* (D. C.), 271 Fed. 97; Id. (C. C. A.) 280 Fed. 334, 335.

On these authorities we are of opinion that the suggestion would have been without force had it been accepted by the court. The several acts of the Transportes Maritimos Do Estado, the Portuguese vice consul general at the port of New York, and the Portuguese minister at Washington, being both tardy and without legal sanction, left the claimant where it stood

on its general appearance and, therefore, left undisturbed the proceedings which went to final decree.

Decision. We find ourselves in full accord with the decision of the Circuit Court of Appeals for the Second Circuit in *The Sao Vicente*, 281 Fed. 111, in so far as that case resembles this one. Doubtless apprehending the force of that decision, based in part on *The Carlo Poma*, 255 U. S. 219, the appellee moved to dismiss the appeal.

The motion to dismiss the appeal is granted.

Buffington, circuit judge, took no part in this decision.

THE "GUL DJEMAL"

The docket title of this case is: *Steamship Gul Djemal, her engines, etc.; Hussein Lutfi Bey, master*, v. *Campbell & Stuart (Inc.)*.

(264 U. S. 90)

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 83. Argued January 4, 1924.—Decided February 18, 1924

The objection that a vessel, owned, possessed, manned, and operated by a foreign State, but engaged in ordinary commerce under charter to a private trader, is immune to libel in the District Court for services and supplies, can not be raised by her master, who, although a naval officer, is not functioning as such, and is not shown to have authority to represent his sovereign in making the objection.

296 Fed. 567, affirmed.

APPEAL from a decree of the District Court sustaining a libel against a ship, for services and supplies.

Mr. William A. Purrington and Mr. John M. Woolsey, with whom Mr. Frank J. McConnell was on the brief, for appellant.

Mr. Oscar R. Houston, with whom Mr. Ezra G. Benedict Fox was on the brief, for appellee.

Mr. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Statement of acts. Seeking to recover for supplies and services furnished at New York during November, 1920, in order to fit her for an intended voyage across the Atlantic, appellee libeled the steamship *Gul Djemal* and caused her arrest under the ordinary admiralty practice. Her master, appearing for the sole purpose of objecting to the court's jurisdiction, claimed immunity for the vessel because owned and possessed by the Turkish Government, and

asked that she be released. No one except the master has advanced this claim.

The parties stipulated:[1] The Turkish Government and the United States are at peace with each other, but diplo-

[1] "First. That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal*, the *Gul Djemal* was owned by the Turkish or Ottoman Government, that it flies the Turkish flag; that Turkey has but one flag, for both national and commercial uses; that it is registered in the name of Seire-Seffain administration; that the *Gul Djemal* is the absolute property of the Ottoman Seire-Seffain administration, the third division of the ministry of marine of the Turkish Government, which is attached to the ministry of war; that the maritime title has been given to the administration Seire-Seffain by the ministry of war. Said Seire-Seffain administration, at the times above mentioned, was (and is) the transport section of the ministry of marine, and was (and is) charged with the control of transport vessels of the Turkish Government, and said vessels (of which the *Gul Djemal* was one), which are capable of commercial uses, are, when not used as transports, used in commerce; whether such vessels are used as transports or in commerce is subject to the direction of the ministry of marine, which, through departments other than the Seire-Seffain, has charge of battleships, artillery, torpedoes, wireless, and engineering work pertaining to all the vessels of the Turkish Navy; that the *Gul Djemal* was transferred for operation to the administration Seire-Seffain from the ministry of war in 1914 and has since been under the control of administration of Seire-Seffain.

"Said Seire-Seffain administration, at the times above mentioned, had (and has), as its head, a military offier of the Turkisk Govenment, in the active or reserve service of the Turkish Government, and said head must be, at all times, a military officer in the employ of the Turkish Government, the Seire-Seffain administration being charged with the transport of troops, and at all the times above mentioned, said head of the Seire-Seffain administration was a colonel; although said head of the Seire-Seffain administration, at the times above mentioned, was, in respect of the *Gul Djemal*, not functioning in a military or naval capacity.

"Second. That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal*, the *Gul Djemal* was in the possession of the Turkish Government, being manned by a master, officers, and crew employed by or under the direction of said Seire-Seffain administration, and paid by the Treasury Department of the Turkish Government through the administration Seire-Seffain; said master, at the times above mentioned, was (and is) a reserve officer in the Turkish Navy employed by the branch of the ministry of marine known as the administration Seire-Seffain, and the navigating officer was a lieutenant in the active service of the Turkish Navy, both detailed by the said ministry of marine to serve on the *Gul Djemal* during the times above mentioned, but in such service they were not performing any naval or military functions, although they were subject to any orders from the department of the Turkish Government charged with naval or military affairs; the other officers and entire crew of the *Gul Djemal*, during the times above mentioned, were civilians, paid by the Turkish Government.

"Third. That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal*, the *Gul Djemal* was engaged in commercial trade, under charter for one round voyage to George Dedeoglou, who engaged to carry passengers and goods for hire, and in such trade the *Gul Djemal* was not functioning in a naval or military capacity, nor was there anything of a naval or military character connected with the voyage of the *Gul Djemal* from Constantinople to New York and return.

"Fourth. That the Turkish Government, prior to the time mentioned in the libel herein, had severed diplomatic relations with the United States of America, advising its peoples by proclamation, however, that American institutions should not be molested but should be treated as heretofore; that said diplomatic relations have not been resumed; although the United States of America maintains unofficial relations with the Turkish Government by American consular representatives, and through the medium of a high commissioner; that during said period of the severed relations, the Spanish ambassador to the United States has represented, and still represents, Turkish interests in the United States, and has been recognized as such representative by the Department of State of the United States of America.

"Fifth. That the Turkish or Ottoman Government, and the Government of the United States of America, are sovereign governments, and were at all the times mentioned herein, at peace with each other, although the Turkish or Ottoman Government was and is an ally of the enemy of the United States in the World War."

matic relations have been severed. The *Gul Djemal* is the absolute property of the Turkish Government and under the administration of the transport section of the ministry of marine. That government employed and paid the master, officers, and crew—the master being a reserve naval officer—and was in possession of the ship when arrested. She "was engaged in commercial trade, under charter for one round voyage to George Dedeoglou, who engaged to carry passengers and goods for hire, and in such trade the *Gul Djemal* was not functioning in a naval or military capacity, nor was there anything of a naval or military character connected with the voyage of the *Gul Djemal* from Constantinople to New York and return."

Claim of immunity.

The court below denied the alleged immunity and passed a decree for the libellant. Upon this direct appeal only the question of jurisdiction is presented. The relevant certificate follows:

"The sole question raised by the answer of the claimant herein, and the sole issue before this court, was the jurisdiction of the court over the steamship *Gul Djemal*, a vessel owned, manned, operated by and in the possession of the sovereign Government of Turkey, at peace with the Government of the United States of America. The allegations of the libellant that it had furnished supplies to the vessel, were admitted by the claimant, whose answer set up that the vessel was immune, as a sovereign-owned vessel, from the process of this court, and that the vessel was not within the admiralty and maritime jurisdiction of this court. I have granted a decree for the amount prayed for by the libellant, and have denied immunity to the vessel because at the time the cause of action and liability on which the libel is founded were created, and at the time the vessel was seized under process of this court, she was, although owned, manned by, and in the possession of the sovereign Government of Turkey, engaged in commercial trade, under charter for hire to a private trader; and furthermore, because diplomatic relations between the United States and Turkey were then severed and no appropriate suggestion was filed from the State Department of the United States."

Appellee maintains that whatever may be the proper rule in our courts concerning the ultimate immunity of vessels owned by foreign governments and employed in

ordinary trade and commerce, such immunity will not be granted upon the mere claim of the master, especially when the United States has no diplomatic relations with the sovereign owner. Such claim can be made only by one duly authorized to vindicate the owner's sovereignty. *Ex parte Muir*, 254 U. S. 522, 532, 533, is relied upon to support this view. It is there said—

"As of right the British Government was entitled to appear in the suit, to propound its claim to the vessel, and to raise the jurisdictional question. * * * Or, with its sanction, its accredited and recognized representative might have appeared and have taken the same steps in its interest. * * * And, if there was objection to appearing as a suitor in a foreign court, it was open to that Government to make the asserted public status and immunity of the vessel the subject of diplomatic representations to the end that, if that claim was recognized by the executive department of this Government, it might be set forth and supported in an appropriate suggestion to the court by the Attorney General, or some law officer acting under his direction."

Treating *Ex parte Muir* as relevant, appellant insists that within the meaning of the declaration there made the master of the *Gul Djemal*, a duly commissioned officer of the Turkish Navy, was the accredited and recognized representative of that Government, possessed of adequate authority to protest against the seizure and object to the court's jurisdiction.

Accredited representative.

We agree with the view advanced by the appellee. *The Anne*, 3 Wheat. 435, reaffirmed by *The Sao Vicente*, 260 U. S. 151, is enough to show that the immunity could not have been successfully set up by a duly recognized consul, representative of his sovereign in commercial matters, in the ordinary course of his official duties, and there seems no adequate reason to presume that the master of the *Gul Djemal* had any greater authority in respect thereto. Although an officer of the Turkish Navy, he was performing no naval or military duty, and was serving upon a vessel not functioning in naval or military capacity but engaged in commerce under charter to a private individual who undertook to carry passengers and goods for hire. He was not shown to have any authority to represent his sovereign other

Decision.

than can be inferred from his position as master and the circumstances specified in the stipulation of facts.

Affirmed.

Mr. Justice Holmes concurs in the result.

THE "WESTERN MAID"

(257 U. S. 419)

Ex parte in the matter of the United States, owner of the American steamship *Western Maid*, petitioner

Ex parte in the matter of the United States, former requisitioned or chartered owner of the auxiliary schooner *Liberty*, petitioner

Ex parte in the matter of the United States, former requisitioned and chartered owner of the American steamship *Carolinian*, petitioner

PETITIONS FOR WRITS OF PROHIBITION AND/OR MANDAMUS

Decided January 3, 1922

1. Neither upon general principle nor under section 9 of the shipping act of September 7, 1916, or section 4 of the "Suits in Admiralty" act of March 9, 1920,[2] is the United States liable for a collision committed by a vessel while owned by it absolutely or *pro hac vice* and employed by it in public and government purposes.
2. *Held*, that a vessel owned by the United States, assigned by the United States Shipping Board to the War Department, manned by a navy crew and engaged in transporting foodstuffs provided by the Government for the relief of the civilian population of Europe after the Great War, to be paid for by the buyer, was not a merchant vessel but a

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[2] Pertinent parts of the statutes above mentioned are as follows:

C. 451, sec. 9, 39 Stat. 730: "That any vessel purchased, chartered, or leased from the [United States Shipping] board may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto. * * *

"Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. No such vessel, without the approval of the board, shall be transferred to a foreign registry or flag, or sold; nor, except under regulations prescribed by the board, be chartered or leased. * * *"

C. 95, sec. 4, 41 Stat. 525, 526: "That if a privately owned vessel not in the possession of the United States or of such [United States Shipping Board Emergency Fleet] corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this act."

vessel engaged in a public service; and that two others, while let or chartered to the United States on a bare-boat basis and devoted to military and naval uses were also of public status.

3. The maritime law is part of the law of the country only in so far as the United States has made it so, and binds the United States only in so far as the United States has consented.
4. The United States has not consented to be sued for torts and therefore it can not be said that, in a legal sense, the United States has been guilty of a tort.
5. This immunity extends to public vessels of the United States, at least while employed in operations of Government; and liability for a tort cannot be fastened upon them by the fiction of a ship's personality, to lie dormant while they remain with the Government and to become enforceable when they pass into other hands. *The Siren*, 7 Wall. 152, and *Workman* v. *New York City*, 179 U. S. 552, distinguished.
6. Prohibition lies to restrain the District Court from exceeding its jurisdiction in admiralty cases.

Rule absolute for writs of prohibition.

Petitions by the United States for writs of prohibition and mandamus to prevent District Courts from exercising jurisdiction in three proceedings *in rem* for collisions that occurred while the vessels libeled were owned absolutely or *pro hac vice* by the United States and employed in the public service.

Argument for the United States.

Mr. Solicitor General Beck, with whom Mr. Assistant Attorney General Ottinger and Mr. J. Frank Staley, special assistant to the Attorney General, were on the brief, for the United States.

The vessels were all of distinctively public status when the collisions occurred.

Section 9 of the shipping act has not waived the immunity of the United States or its vessels from suits *in rem* for losses arising while they are employed in the war service. Both the collision loss and the enforcement of the claim against the vessel must occur while the Government vessel is employed solely as a merchant vessel, and then is operating for the account of others than the Government, under charter or lease.

The filing of suggestions under section 4 of the suits in admiralty act only determines the United States as claimant for the vessel and substitutes its credit for the payment of the decree finally entered, if any, instead of the usual bond or stipulation for value otherwise entered to secure the release of a vessel from attachment. The proceedings continue as proceedings *in rem*. Manifestly,

if the libel does not state a cause of action, *in rem* against the vessel, this section can not create one.

Unless there is some magic in such public vessels' personification, the Government can not be held for these torts. There is no distinction between the Government and its property. There should be no relief by indirection where Congress has not provided relief directly. *Bigby* v. *United States*, 188 U. S. 400, 408; *Langford* v. *United States*, 101 U. S. 341, 344; *Gibbons* v. *United States*, 8 Wall. 269, 274. Public vessels are part of the sovereign State and their liabilities are merged in those of the sovereign. *United States* v. *Ansonia Brass Co.*, 218 U. S. 452; *Board of Commissioners* v. *O'Connor*, 86 Ind. 531, 537; *Rowley* v. *Conklin*, 89 Minn. 172; *The Fidelity*, 16 Blatchf. 569, 572, 573; *The Parlement Belge*, 4 Asp. M. C. 234, 237, 241; *The Prins Frederik*, 2 Dods. 451.

The law merchant personified the commercial ship not a public ship. Commercial vessels are sent in trade to all ports. Their owners are usually inaccessible for purposes of suit, and their personal responsibilities are uncertain. The necessities of the vessel's operation in merchant service demand that the vessel, the *res*, shall be responsible for her torts and contracts. The basis of the law governing merchant vessels is aid of commerce. *Vandewater* v. *Mills*, 19 How. 82; *United States* v. *Brig Malek Adhel*, 2 How. 210; *The China*, 7 Wall. 53; *The Eugene F. Moran*, 212 U. S. 466; *The Young Mechanic*, 2 Curtis 404; Holmes, The Common Law, page 25; Mayer's Admiralty Law and Practice, page 8. The reason and the origin of the rule show that it can not apply to public ships engaged in war service. Cf. *Ex parte New York, No. 1*, 256 U. S. 490.

Sovereign immunity includes immunity from lien liability as well as from process. *Ex parte Muir*, 254 U. S. 522; *Ex parte Hussein Lutfi Bey*, 256 U. S. 616; *Ex parte New York, No. 1*, 256 U. S. 490; *Ex parte New York, No. 2*, 256 U. S. 503; *The Davis*, 10 Wall. 15; *The Tampico*, 16 Fed. 491; *Johnson Lighterage Co.*, 231 Fed. 365; *The Rock Island Bridge*, 6 Wall. 213; *Kawananakoa* v. *Polyblank*, 205 U. S. 349; *Riddoch* v. *State*, 68 Wash. 329; 32 Harv. Law Rev. 447; 30 Harv. Law Rev. 20. *The Siren*, 7 Wall. 152, and *Workman* v. *New York City*, 179 U. S. 552, distinguished. Cf. *Carr* v. *United States*, 98 U. S. 433, 439.

Claim for owners.

Mr. T. Catesby Jones, with whom *Mr. James W. Ryan* was on the brief, for respondent in No. 21, Original.

The *Western Maid* was a merchant vessel at the time of the collision. The sale of foodstuffs to enemy aliens is not a necessary function of the sovereign. Indeed, the act of February 25, 1919, 40 Stat. 1161, indicates the opinion of Congress that it was unwise for the Government to engage in trade with enemy populations. It is doubtful whether it is constitutional for the Government to engage in transporting foodstuffs to be offered for sale at destination. *United States* v. *Strang*, 254 U. S. 491; *United States Shipping Board* v. *Wood*, 274 Fed. 893.

The collision took place two months after the armistice. Under such circumstances, the vessel could in no event be called a vessel engaged in a military operation. The Government has the burden of proof to establish that she was a public vessel engaged in a military operation. *Ex parte Muir*, 254 U. S. 522; *In re Jupp*, 274 Fed. 494, 485.

Even if it were a fact that no freight was to be paid for the carriage, this circumstance would not affect the case. It was intended that her cargo was to be sold to the civilian population of Europe.

There is no suggestion that the vessel was commissioned. *The Exchange*, 7 Cr. 116. On the contrary, the record shows that she was registered as a merchant ship, and it is to be inferred that she was operating under this registry. (Rev. Stats. secs. 4170, 4171; Navigation Laws of the United States, 1919, p. 41.)

Congress, by the suits in admiralty act of 1920, has waived immunity as to merchant vessels. In effect this is a suit under that act.

If we assume that the *Western Maid* was a public vessel at the time of the collision, nethertheless a claim in favor of the libelant was created against her at that time, which could be enforced *in rem*. *The Siren*, 7 Wall. 152, 13 Wall. 389. The Government contends that the language in 7 Wall. 155, 156, 158, is a dictum. When the members of this court, in face of a single dissent, make a doctrine one of the principal grounds for the court's decision, such a doctrine can hardly be called a dictum. The Government suggests that, because the *Siren* was a prize, the case is distinguishable. This conclusion does not follow. See Lord, Admiralty Claims, 19 Col. Law Rev. 477.

As we view the case, *The Siren* was a decision directly in point. The proposition relied upon by Mr. Justice Nelson as a ground for his dissent (7 Wall. 165), viz, that, if an owner of an offending vessel is not liable, it follows that there can be no lien, is contrary to the decisions in *The China*, 7 Wall. 53; *Ralli* v. *Troop*, 157 U. S. 386; *The Blackheath*, 195 U. S. 361; *Tucker* v. *Alexandroff*, 183 U. S. 424; *The Palmyra*, 12 Wheat. 1; *Brig. Malek Adhel*, 2 How. 210; *The John G. Stevens*, 170 U. S. 122; and *The Barnstable*, 181 U. S. 464, 467.

Liability *in rem* is entirely independent of liability *in personam*. *Homer Ramsdell Co.* v. *La Compagnie Généralé Transatlantique*, 182 U. S. 406.

Because of the difference between the American and English conceptions of the liability of a ship, the English authorities are not in point. *The Davis*, 10 Wall. 15; *The Carlo Poma*, 259 Fed. 369. But even in England it is settled, as was said in *Workman* v. *New York City*, 179 U. S. 552, that a collision impresses a liability on a public vessel which becomes enforcible when the crown waives the immunity of the public vessel. *The Ticonderoga*, 1 Swab. Adm. Rep. 215; *Fletcher* v. *Braddick*, 2 Bos. & P. 182.

In *Ex parte New York, No. 1*, 256 U. S. 490, this court said that the *Workman Case* dealt with a question of the substantive law of admiralty, not the power to exercise jurisdiction over the person of the defendant.

The doctrine of *The Davis* and *The Siren* has long been familiar to the Federal courts. *The Tampico*, 16 Fed. 491; *Thompson Navigation Co.* v. *Chicago*, 79 Fed. 984; *Johnson Lighterage Co.*, 231 Fed. 365; *The Attualita*, 238 Fed. 909; *The Luigi*, 230 Fed. 493; *The Othello*, 5 Blatchf. 343.

The Fidelity, 16 Blatchf. 569, was disapproved in *Thompson Navigation Co.* v. *Chicago*, 79 Fed. 984, and, so far as its dictum indicated a departure from the doctrine of *The Siren* and *The Davis*, was expressly disapproved in *Workman* v. *New York City*, 179 U. S. 552, and in *The Ceylon Maru*, 266 Fed. 396. See also *The U. S. S. Hisko, U. S. S. Roanoke and U. S. S. Pocahontas*, S. D. N. Y., March 17, 1921, Manton, J., (unreported); *The U. S. S. Newark*, S. D. N. Y., March 18, 1921, Knox, J., (unreported); *The U. S. S. Sixaola*, S. D. N. Y., April 21, 1921, Mayer, J., (unreported); *The F. J. Luckenbach*, 267 Fed. 931; *The Liberty* (unreported); now before this

court; *The Carolinian*, 270 Fed. 1011. And see *The Florence H*, 248 Fed. 1012; *The Gloria*, 267 Fed. 929; *The City of Philadelphia*, 263 Fed. 234; *United States* v. *Wilder*, 3 Sumner, 308, 312.

The principle that the maritime law extends to public vessels has been recognized by Congress, Act of August 19, 1890, c. 802, 26 Stat. 320; Rev. Stats., sec. 4233; *The Esparta*, 160 Fed. 269; *The A. A. Raven*, 231 Fed. 380. Cf. *Admiralty* v. *S. S. Eleanor*, VI Lloyd's List Law Rep. 456.

It can not be said that the liability arises from the act of the Government in waiving its immunity from suit. It existed before this suit; otherwise there could be no cause of action on which to base the suit. *United States* v. *Ringgold*, 8 Pet. 162; *United States* v. *Lee*, 106 U. S. 196, 206; Lord, Admiralty Claims, 19 Col. Law Rev. 477; Hearings, Senate Committee on Commerce, 66th Cong., 1st sess., on S. 2253, p. 18.

Kawananakoa v. *Polyblank*, 205 U. S. 349, 353, was not a suit in admiralty and the facts were wholly different from those in this case. It was not there intended to modify the doctrine of *The Siren*, *The Davis*, and of the *Ringgold Case*, *supra*.

Mr. Edward E. Blodgett, with whom Mr. Foye M. Murphy was on the brief, for respondent in No. 22, Original.

The burden of proving immunity from the lien is upon the petitioner. *The Tampico*, 16 Fed. 491.

The Liberty was subject to a maritime lien arising out of this collision. *The Bold Buccleugh*, 7 Moore P. C. 267; *The China*, 7 Wall. 53; *Ralli* v. *Troop*, 157 U. S. 386; *Briggs* v. *Light Boat*, 7 Allen, 287; *The John G. Stevens*, 170 U. S. 113; Holmes, The Common Law, pp. 26–34; *The Little Charles*, 1 Brock. 347; *The Palmyra*, 12 Wheat. 1; *United States* v. *Brig Malek Adhel*, 2 How. 210; *The John Fraser*, 21 How. 184; *The Merrimac*, 14 Wall. 199; *The Clarita*, 23 Wall. 1; *The Barnstable*, 181 U. S. 464; *The Luigi*, 230 Fed. 493; *Johnson Lighterage Co.*, 231 Fed. 365.

The lien arises though the vessel be owned, manned, and operated by a sovereign for war purposes. *United States* v. *Wilder*, 3 Sumner, 308; *The Davis*, 10 Wall. 15; *The Siren*, 7 Wall. 152; *Workman* v. *New York City*, 179 U. S. 552; *The Florence H*, 248 Fed. 1012; *The Gloria*,

267 Fed. 929; *The F. J. Luckenbach*, 267 Fed. 931; *The City of Philadelphia*, 263 Fed. 234.

The property of a sovereign is not immune from pre-existing maritime liens. *Briggs* v. *Light Boat, supra; United States* v. *Wilder, supra; The St. Jago de Cuba*, 9 Wheat. 416; *The Copenhagen*, 1 C. Rob. Adm. 289.

The petitioner by the act of March 9, 1920, has impliedly admitted that a lien may be created upon vessels owned or operated by it.

In England, technical immunity attaches to all property owned by the crown, irrespective of whether or not it is in possession of the sovereign. *The Broadmayne*, L. R. [1916] P. D. 64; *The Scotia*, [1903] A. C. 501. But the lords commissioners of the admiralty represent the crown, and have a discretionary power, freely exercised, to waive the privileges of the crown and consent to jurisdiction. *The Fidelity*, 16 Blatchf. 569; *United States* v. *New York & Oriental S. S. Co.*, 216 Fed. 61; *Thompson Navigation Co.* v. *Chicago*, 79 Fed. 984; *United States* v. *Lee*, 106 U. S. 196, 208; *Homer Ramsdell Co.* v. *La Compagnie Genéralé Transatlantique*, 182 U. S. 406. Furthermore, the personification of the *res* is not carried so far in England as in the United States. In the former the procedure *in rem* is used merely as a means to compel the appearance of the respondent, and judgment runs against the individual—the seizure of the *res* is incidental. *The Parlement Belge*, 5 P. D. 197.

Mr. Charles S. Haight, with whom Mr. Wharton Poor was on the brief, for respondent in No. 23, Original.

The case of the *Carolinian* is materially different from that of the *Western Maid* and other cases, where at the time of the collision title to the ship was in the Government.

The officers in command of the *Carolinian* when this collision occurred, while imposed upon the ship by the authority of the Government under the act of June 15, 1917, occupied no different position from the compulsory pilot imposed upon the *China*. (7 Wall. 53.) *The John G. Stevens*, 170 U. S. 113; *Tucker* v. *Alexandroff*, 183 U. S. 424; *Workman* v. *New York City*, 179 U. S. 552.

The decisions show that in order to sustain a suit *in rem* for collision only two conditions need exist: (1) Fault on the part of the navigators, and (2) the ability of the court to execute its process by seizure.

The attributes of sovereignty do not inure to the benefit of private individuals. *Moran* v. *Horsky,* 178 U. S. 205.

That a national war vessel may be held in fault for a collision due to the negligence of her officers and crew was directly decided in *The Sapphire,* 11 Wall. 164.

Even if, at the time of the collision, the *Carolinian* had been owned by the United States, an inchoate lien would nevertheless have been created which could be enforced in the present suit. *The Florence H,* 248 Fed. 1012; *The F. J. Luckenbach,* 267 Fed. 931; *The Gloria,* 267 Fed. 929; *The Ceylon Maru,* 266 Fed. 396; *Johnson Lighterage Co.,* 231 Fed. 365; *The Tampico,* 16 Fed. 491; *United States* v. *Wilder,* 3 Sumner, 308; *The City of Philadelphia,* 263 Fed. 234; *The Siren,* 7 Wall. 152; *The Davis,* 10 Wall. 15; *Workman* v. *New York City,* 179 U. S. 552.

The only basis on which the exemption of Government property from such a lien can be rested is the mediæval doctrine of "prerogative," which forms no part of our jurisprudence. *Dollar Savings Bank* v. *United States,* 19 Wall. 227; *United States* v. *Wilder, supra.*

Nor is there any principle of public policy which prevents the creation of a maritime lien against a public vessel owned by the United States. When the privately owned vessel is at fault, the United States collects its damages from the ship or her owners, and it is only fair that a private owner should have a like right when the Government ship is to blame. Congress has recognized this principle of equality by making the statutory rules for preventing collisions at sea binding upon public ships as well as private, 26 Stat. 320; 28 Stat. 645; 2 Fed. Stat. Ann., 2d ed., 376, 402, 449. If a merchant ship and a war ship are equally at fault, the damages are divided. *The Sapphire, supra.*

The justice of paying claims arising out of collisions for which public vessels were at fault has always been recognized by Congress through many special acts allowing claims.

The doctrine of the immunity of the sovereign from suit—to which so many exceptions have been made by statute as almost do away with the rule—is based not upon principle but upon precedent. *United States* v. *Lee,* 106 U. S. 196, 206; *United States* v. *Emery Bird Thayer Realty Co.,* 237 U. S. 28, 32. This is evidenced

by the practical relief from it in collision cases afforded in England, France, Germany, and in the State of New York.

The act of March 9, 1920, is an express recognition by Congress that a maritime lien may exist against a public vessel even though used solely for governmental purposes, and as the United States has secured the release of the *Carolinian* under this act it can not now contend that the court is without jurisdiction.

Opinion of court.

Mr. Justice HOLMES delivered the opinion of the court.

These are petitions for prohibition to prevent district courts of the United States from exercising jurisdiction of proceedings *in rem* for collisions that occurred while the vessels libeled were owned, absolutely or *pro hac vice*, by the United States, and employed in the public service. The questions arising in the three cases are so nearly the same that they can be dealt with together.

Statement of fact.

The *Western Maid* was and is the property of the United States. On January 10, 1919, she was allocated by the United States Shipping Board to the War Department for service as a transport. She had been loaded with foodstuffs for the relief of the civilian population of Europe, to be delivered on arrival at Falmouth, England, to the order of the Food Administration Grain Corporation, the consignor, American Embassy, London, care of the chief quartermaster, American Expeditionary Forces, France; subject to the direction of Mr. Hoover. If it should prove impracticable to reship or redirect to the territories lately held by the Central Empires, Mr. Hoover was to resell to the Allied Governments or to the Belgian Relief; the foodstuffs to be paid for by the buyer. The vessel was manned by a Navy crew. Later on the same day, January 10, 1919, in the New York Harbor, the collision occurred. On March 20, 1919, the vessel was delivered to the United States Shipping Board. The libel was filed on November 8, 1919. Act of September 7, 1916, c. 451, sec. 9, 39 Stat. 728, 730. *The Lake Monroe*, 250 U. S. 246. On February 20, 1920, the Government moved that it be dismissed for want of jurisdiction. The district court overruled the motion. On April 11, 1921, the Attorney General moved for leave to file the present petition in this court. Leave was granted and the case has been heard.

The *Liberty* was a pilot boat let to the United States on the bare-boat basis at a nominal rate of hire. She had been manned by a crew from the United States Navy and commissioned as a naval dispatch boat, and was employed to serve military needs in war service. The collision took place on December 24, 1917, while she was so employed, in Boston Harbor. Afterwards the vessel was redelivered to the owners, and still later, on February 5, 1921, the suit now in question was brought against her. On February 14, under the act of March 9, 1920 (c. 95, sec. 4, 41 Stat. 525), the United States filed a suggestion of its interest, and also set up the above facts. The district court held that they constituted no defense, and this petition was brought by the Attorney General along with that last mentioned.

The steamship *Carolinian* had been chartered to the United States upon a bare-boat charter and had been assigned to the War Department, by which she was employed as an Army transport and furnished with an Army crew. While she was so employed the collision took place in the harbor of Brest, France, on February 15, 1918. Afterwards the *Carolinian* was returned to the owners and she was employed solely as a merchant vessel on July 9, 1920, when the suit in question was begun, under which the vessel was seized. In the same month the United States filed a suggestion of interest and on January 6, 1921, set up the foregoing facts and prayed that the libel be dismissed. The District Court maintained its jurisdiction and this petition was brought by the Attorney General along with the other two. (270 Fed. 1011.)

Liability of the United States.

It may be assumed that each of these vessels might have been libeled for maritime torts committed after the redelivery that we have mentioned. But the act of September 7, 1916 (c. 451, sec. 9), does not create a liability on the part of the United States, retrospectively, where one did not exist before. Neither, in our opinion, is such a liability created by the act of March 9, 1920 (c. 95, sec. 4), authorizing the United States to assume the defense in suits like these. It is not required to abandon any defense that otherwise would be good. It appears to us plain that before the passage of these acts neither the United States nor the vessels in the hands of the United States were liable to be sued for these alleged maritime torts. The *Liberty* and the *Carolinian* were

employed for public and Government purposes and were owned *pro hac vice* by the United States. It is suggested that the *Western Maid* was a merchant vessel at the time of the collision, but the fact that the food was to be paid for and the other details adverted to in argument can not disguise the obvious truth that she was engaged in a public service that was one of the constituents of our activity in the war and its sequel and that had no more to do with ordinary merchandizing than if she had carried a regiment of troops. The only question really open to debate is whether a liability attached to the ships which, although dormant while the United States was in possession, became enforcible as soon as the vessels came into hands that could be sued.

Maritime law.

In deciding this question we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic overlaw to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law, that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules. *The Lottawanna*, 21 Wall. 558, 571, 572. *Dalrymple* v. *Dalrymple*, 2 Hagg. Cons. 54, 58, 59. Dicey, Conflict of Laws, 2d ed., 6, 7. Also we must realize that the authority that makes the law is itself superior to it, and that if it consents to apply to itself the rules that it applies to others the consent is free and may be withheld. The sovereign does not create justice in an ethical sense, to be sure, and there may be cases in which it would not dare to deny that justice for fear of war or revolution. Sovereignty is *a* question of power, and no human power is unlimited. *Cariño* v. *Insular Government of the Philippine Islands*, 212 U. S. 449, 458. But from the necessary point of view of the sovereign and its organs whatever is enforced by it as law is enforced as the expression of its will. *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353.

The United States has not consented to be used for torts, and therefore it can not be said that in a legal sense the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so. If then we imagine the sovereign power announcing the

system of its laws in a single voice it is hard to conceive it as declaring that while it does not recognize the possibility of its acts being a legal wrong and while its immunity from such an imputation of course extends to its property, at least when employed in carrying on the operations of the Government—specifically appropriated to national objects, in the language of *Buchanan* v. *Alexander*, 4 How. 20—yet if that property passes into other hands, perhaps of an innocent purchaser, it may be seized upon a claim that had no existence before. It may be said that the persons who actually did the act complained of may or might be sued and that the ship for this purpose is regarded as a person. But that is a fiction, not a fact, and as a fiction is the creation of the law. It would be a strange thing if the law created a fiction to accomplish the result supposed. It is totally immaterial that in dealing with private wrongs, the fiction, however originated, is in force. See *Liverpool, Brazil & River Plate Steam Navigation Co.* v. *Brooklyn Eastern District Terminal*, 251 U. S. 48, 53. The personality of a public vessel is merged in that of the sovereign. *The Fidelity*, 16 Blatchf, 569, 573. *Ex parte State of New York, No. 2*, 256 U. S. 503.

But it is said that the decisions have recognized that an obligation is created in the case before us. Legal obligations that exist but can not be enforced are ghosts that are seen in the law but that are elusive to the grasp. The leading authority relied upon is *The Siren*, 7 Wall. 152. The ground of that decision was that when the United States came into court to enforce a claim it would be assumed to submit to just claims of third persons in respect of the same subject-matter. 7 Wall. 154. *Carr* v. *United States*, 98 U. S. 433, 438. In reaching its result the court spoke of such claims as unenforcible liens, but that was little more than a mode of expressing the consent of the sovereign power to see full justice done in such circumstances. It would have been just as effective and more accurate to speak of the claims as ethical only, but recognized in the interest of justice when the sovereign came into court. They were treated in this way by Dr. Lushington in *The Athol*, 1 Wm. Rob. 374, 382. Further distinctions have been taken that need not be adverted to here. There was nothing decided in *Workman* v. *New York City*, 179 U. S. 552, that is contrary to our conclusion, which, on the other hand, is favored by *The Fidelity*,

16 Blatchf. 569, 573, and *Ex parte State of New York, No. 1*, 256 U. S. 490, and *Ex parte State of New York, No. 2*, 256 U. S. 503. The last cited decisions also show that a prohibition may be granted in a case like this. See *The Ira M. Hedges*, 218 U. S. 264, 270.

Rule absolute for writs of prohibition.

Mr. Justice McReynolds did not hear the argument in this case and took no part in the decision.

Dissenting opinions.

Mr. Justice McKenna, with whom concurred Mr. Justice Day and Mr. Justice Clarke, dissenting.

The question in the cases is without complexity, and the means of its solution ready at hand. The question is, What is the law applicable to colliding vessels and what remedy is to be applied to the offending one, if there be an offending one? The question, I venture to say, has unequivocal answer in a number of decisions of this court if they be taken at their word. And why should they not be? That they have masqueraded in a double sense, can not be assumed; that they have successively justified implications adverse to their meaning would be a matter of wonder.

What then do they express to be the law of colliding vessels, the assignment of offence, if offence there be, and how far is it dependent, if at all, upon whether the offender was in public or private service?

Admiralty jurisdiction

The answer may be immediate. This court has kept steadily in mind that the admiralty jurisprudence of the country, as adopted by the Constitution, has a distinctive individuality, and this court has felt the necessity of keeping its principles in definite integrity, and the r medies intact by which its principles can alone be realized. The most prominent and efficient of its remedies is that which subjects its instrumentalities, its ships particularly, to judgment. Personality is assigned to them and they are considered to pledge to indemnify any damage inflicted through them. They are made offenders and have the responsibility of offenders, and the remedy is suited to the purpose. In *Rounds* v. *Cloverport Foundry & Machine Co.*, 237 U. S. 303, 306, it is said, Mr. Justice Hughes delivering the opinion of the court, "The proceeding *in rem* which is within the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor or offending thing,—in which the vessel is itself 'seized and impleaded as the defendant, and is judged and sentenced accordingly.'"

In the *John G. Stevens*, 170 U. S. 113, 120, the court, through Mr. Justice Gray, declared, "The foundation of the rule that collision gives to the party injured a *jus in re* in the offending ship is the principle of the maritime law that the ship, by whomsoever owned, or navigated, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages. This principle, as has been observed by careful text writers on both sides of the Atlantic, has been more clearly established and more fully carried out, in this country than in England. Henry on Admiralty, section 75, note; Marsden on Collisions (3d ed.) 93." The case in many ways and by many citations fortifies and illustrates the principle.[5]

The *Siren* was cited and the fact is pertinent as we shall presently see. The *China*, 7 Wall. 53, was also cited and quoted from. The quotation was repeated in *Ralli* v. *Troop*, 157 U. S. 386, 402, 403, where it is said that the liability of a vessel is not derived from the authority or agency of those on board, either under the civil or common law, "but upon a distinct principle of maritime law, namely, that the vessel, in whosesoever hands she lawfully is, is herself considered as the wrongdoer, liable for the tort, and subject to a maritime lien for the damages.

In *Tucker* v. *Alexandroff*, 183 U. S. 424, 438, this court by Mr. Justice Brown gave graphic representation to the same principle. He described a ship prior to her launching as "a mere congeries of wood and iron" but after launching she took on a name, a personality of her own and had in a sense volition, became competent to contract and be contracted with, sue and be sued, could have agents of her own, was capable of committing a tort and was pledged to its reparation. Cases were cited, the *Siren* among others.

The doctrine thus explicitly announced is denied application in the pending cases and upon what grounds? As I understand, the contention is that a vessel has not independent guilt, that there must be fault in its owner or operator, his fault becoming its fault. This has been said, but it puts out of view her character as bail and that the innocent victim of the injury she has inflicted shall not

[5] *General Mutual Insurance Co.* v. *Sherwood*, 14 How. 351, 363; *The Creole*, 2 Wall. Jr. 485, 518; *The Mayurka*, 2 Curtis, 72, 77; *The Young Mechanic*, 2 Curtis, 404; *The Kiersage*, 2 Curtis, 421; *The Yankee Blade*, 19 How. 82, 89; *The Rock Island Bridge*, 6 Wall. 213, 215; *The China*, 7 Wall. 53, 68; *The Siren*, 7 Wall. 152, 155; *The Lottawanna*, 21 Wall. 558, 579; *The J. E. Rumbell*, 148 U. S. 1, 10, 11, 20; *The Glide*, 167 U. S. 606.

be remitted to the insufficient or evasive responsibility of persons but shall have the security of the tangible and available value of the thing. And this responsibility and fullness of indemnity we have seen it was declared in the *John G. Stevens*, *supra*, distinguished the law of this country from that of England.

But if the contention were conceded it would not determine these cases. I reject absolutely that because the Government is exempt from suit it can not be accused of fault. Accountability for wrong is one thing, the wrong is another.

But I do not have to beat about in general reasoning. I may appeal to the authority of the *Siren*, 7 Wall. 152 and the cases that have approved and followed it. A gloss is attempted to be put upon it—which we think is unjustified and inaccurate unless, indeed, it can be asserted that the writer of the opinion did not know the meaning of the words he used, and, that the members of the court who concurred with him, were equally deficient in understanding. And their insensibility to what the words conveyed had no excuse. A dissenting justice tried to bring their comprehensive import to understanding, proclaimed indeed, that the words had the extent and consequence that the court now says were not intended or accomplished.

The *Siren*.

The *Siren*, while in charge of a prize master and crew, having been taken in prize by the United States, ran into in the port of New York and sank the sloop *Harper*. The collision was regarded by the court as the fault of the *Siren*. She was condemned as prize and sold and the proceeds deposited with the Assistant Treasurer of the United States. The owners of the *Harper* asserted a claim upon her and her proceeds for the damages sustained by the collision. The District Court rejected the claim. Its action was reversed by this court.

The United States was an actor in the case and this was regarded by the court, who spoke by Mr. Justice Field, as removing the impediment to the claim of the owners of the *Harper*. It was not, however, the basis of recovery. There was no confusion in the language or conception of the learned justice, nor in the court, of that. By becoming the actor, the United States, it was said, waived its exemption from direct suit and opened "to consideration all claims and equities in regard to the

property libelled"—not, of course, that the waiver of exemption created the "claims and equities." They, it was explicitly said, were created against the offending vessel by the collision. "In such case," the language was, "the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, can not be enforced by direct proceedings against the vessel." And again, "The inability to enforce the claim against the vessel is not inconsistent with its existence."

The distinction was clearly made between exemption of the United States, the offense of the vessel and the existence of a claim against it in consequence of its offense. And the distinction was emphasized in the dissent of Mr. Justice Nelson. He was at pains to distinguish between liability to suit and legal liability for the act of injury, the ground of suit. And the basis of his dissent was the same as the basis of the opinion of the court in the present cases, but not so epigrammatically expressed. In the opinion in these cases it is said that "the United States has not consented to be sued for torts, and therefore it can not be said that in a legal sense the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so."

Mr. Justice Nelson was more discursive. He said that "if the owner of the offending vessel [he regarded the *Siren* as owned by the United States] is not liable at all for the collision, it follows, as a necessary legal consequence, that there can be no lien, otherwise the nonliability would amount to nothing." And again, "if the Government is not responsible, upon the principles of the common law, for wrongs committed by her officers or agents, then, whether the proceedings in the admiralty are against the vessel, or its proceeds, the court is bound to dismiss them." And giving point to this view the learned justice observed that "no principle at common law is better settled than that the Government is not liable for the wrongful acts of her public agents."

I repeat, that in view of these extracts from Mr. Justice Nelson's dissent, misapprehension of its opinion by the court is not conceivable nor carelessness of utterance. Yet the opinion in the present cases practically so asserts and, in effect, regards Mr. Justice Nelson's dissent as the law of the *Siren* and not that which the court pronounced.

The court decided that the vessel was the offending thing, and though it could not be reached in the hands of the Government, this "inability to enforce the claim against the vessel" was "not inconsistent with its existence."

The inevitable deduction is that in such situation the enforcement of a claim is suspended only, and when the vessel passes from the hands of the Government, as the offending vessels have in the cases at bar, they and "all claims and equities in regard to" them may be enforced.

The case was commented on in The *Davis*, 10 Wall. 15, 20, and the gloss now put upon it rejected. It is there said that the well-supported doctrine of the case is "that proceedings *in rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court."

So again in *Workman* v. *New York City*, 179 U. S. 552, where it is said, Chief Justice White delivering the opinion of the court, after an exhaustive review of cases, such as he usually gave, "It results that, in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction." In view of this it is difficult to understand how it can be said that there was nothing that case decided contrary to the conclusion in these cases.

Against this array of cases and their reasoning, *Ex parte State of New York, No. 2*, 256 U. S. 503, and *Ex parte State of New York, No. 1*, 256 U. S. 490, are adduced. Neither case has militating force. The latter case decided nothing but that a State can not be sued without its consent. An indisputable proposition which this court in its opinion had to clear from confusing or disturbing circumstances. In the former case, The *Queen City*, a steam tug, was in the possession and service of the State of New York and to have awarded process against it as the district court did, would have arrested the service. This court rightfully reversed that action. The tug had not been released from that immunity as the vessels were in the pending cases.

Counsel for claimants in opposition to the petition cite cases at circuit and district which followed *The Siren.*[4] It is not necessary to review or comment upon them. They are testimony of what the judiciary of the country considered and consider *The Siren* and other cases decided. Therefore we can not refrain from saying that it is strange, that notwithstanding the language of *The Siren*, its understanding and acceptance in many cases in this court, the enforcement of its doctrine at circuit and district, it should now be declared erroneous. The cases at bar would seem to be cases for the application of the maxim of *stare decisis* which ought to have force enough to resist a change based on finesse of reasoning or attracted by the possible accomplishment of a theoretical correctness.

The rules should be discharged.

THE "CHARLOTTE"

(299 F. 595)

CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

April 28, 1924

Before HOUGH, MANTON, and MAYER, Circuit Judges.

PER CURIAM: This is the same litigation which gave rise to the proceedings in *Ex parte New York No. 1*, 256 U. S. 491.

The *Charlotte*, owned by claimants herein, was by a document called a charter and lease, in the employment of the State of New York and used by the authority of that State in towing on the Erie Canal. Libelant asserts by this suit *in rem* that she was negligently navigated to the injury of his barge or canal boat. The question here is whether this action can be maintained under the author-

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[4] *The U. S. S. Hisko, U. S. S. Roanoke,* and *U. S. S. Pocahontas* (Circuit Judge Manton S. D. N. Y.) (March 17, 1921, unreported opinion annexed to brief);

The U. S. S. Newark (District Judge Knox, S. D. N. Y.) (March 18, 1921, unreported opinion annexed to brief);

The U. S. S. Sixaola (District Judge Mayer, S. D. N. Y.) (April 21, 1921, unreported opinion annexed to brief);

The F. J. Luckenbach, 267 Fed. 931; *The Liberty*, now before this court; *The Carolinian*, 270 Fed. 1011, also now before this court.

Also: *The Florence H.*, 248 Fed. 1012; *The Gloria*, 267 Fed. 929; *The City of Philadelphia*, 263 Fed. 234.

Counsel also cites: *The Tampico*, 16 Fed. 491; *Thompson Navigation Co.* v. *City of Chicago*, 79 Fed. 984; *Johnson Lighterage Co.*, 231 Fed. 365; *The Attualita*, 238 Fed. 909; *The Luigi*, 230 Fed. 493; *The Othello*, 5 Blatchf. 343.

ity of the case above cited, of *The Queen City* (*Ex parte New York No. 2*) 256 U. S. 503, and *The Western Maid*, 257 U. S. 419.

[1] Nothing need be added to the opinion of the court below in respect of its holding that the charter and lease of the *Charlotte* existing at the time of the alleged negligence was a demise of the vessel and made the State of New York her owner *pro hac vice*.

Immunity of State of New York.

The first case cited above shows that no action in *personam* would lie against the State of New York in the admiralty for the damage complained of; *The Queen City* shows that if the *Charlotte* had been owned absolutely by the State, no action *in rem* could have been maintained against the vessel; and the *Western Maid* shows that in respect of the sovereign United States there is no difference between a vessel owned outright and one owned *pro hac vice* by the sovereign.

[2] This reduces the question at bar to an inquiry whether there is any difference between the sovereignty of the United States and that of the State of New York in so far as its immunity from suits of this kind is concerned.

The general nature of a State's sovereignty has been too often set forth to require additional exposition now; it is summarily stated with due citation of authorities in 36 Cyc. 828.

It is thought that no State has been more insistent upon the extent of its sovereign powers than the State of New York, and that sovereignty has recently received full recognition in *Marshall* v. *People of the State of New York*, 254 U. S. 380, where all the New York cases are cited. We think it unnecessary to do more than state our acceptance of the proposition that in the absence of any diminution of power in this regard by the Constitution of the United States, the State of New York can neither be sued in *personam* for the tort complained of, nor can its property, whether absolute or owned *pro hac vice*, be made to respond for the same tort. In other words, the doctrine of *Western Maid*, *supra*, applies to and governs this case.

Decree affirmed, with costs.

THE "PORTO ALEXANDRE"

([1920], P. 30)

Admiralty—Public vessel—Immunity from process of arrest—Trading by public vessel

A vessel owned or requisitioned by a sovereign independent state and earning freight for the state, is not deprived of the privilege, decreed by international comity, of immunity from the process of arrest, by reason of the fact that she is being employed in ordinary trading voyages carrying cargoes for private individuals.

The Parlement Belge (1880) 5 P. D. 197 considered and applied.

Appeal from a decision of Hill J. setting aside the writ *in rem* and all subsequent proceedings against the steamship *Porto Alexandre*.

The *Porto Alexandre*, formerly the German-owned steamship *Ingbert*, a vessel of 2,699 tons gross, by a decree of the Portuguese prize court of January 30, 1917, was adjudged a lawful prize of war. She had previously been requisitioned by the Portuguese Government and handed over to the Commission of Services of Transports Maritims and was being employed in ordinary trading voyages earning freight for the Government.

In September, 1919, she loaded a cargo of cork shavings for carriage to Liverpool under a bill of lading from which it appeared that the cargo was shipped by and consigned to the Portuguese Import and Export Co., (Ltd.). On September 13, when in the Crosby Channel at the entrance to the Mersey, the vessel got aground and salvage services were rendered to her by three Liverpool tugs, the *Nora*, *Expert*, and *Torfreda*. On September 16 a writ *in rem* was issued on behalf of the owners, masters, and crews of these tugs in respect of the services against "the owners of the Portuguese steamship *Porto Alexandre*, her cargo and freight." On September 24 the solicitors for the defendants accepted service of the writ and undertook to appear on behalf of the cargo owners, and on September 25 entered appearance "under protest" for the owners and freight. On October 2 a motion was set down to set aside the writ and all subsequent proceedings on the ground that the *Porto Alexandre* and the freight "were and are the public national property of and/or requisitioned by and in the possession and public use and service of the Portuguese Government." The motion came before Hill, J., on October 20 and 27, 1919, and was supported by a communication from the

Portuguese chargé d'affaires to Lord Curzon, the Secretary of State for Foreign Affairs, who in turn communicated it to the learned judge, that the *Porto Alexandre* was "a state-owned vessel belonging to the Government of the Portuguese Republic."

Hill, J., in giving judgment said that he had arrived at his decision with the greatest reluctance. Upon the facts he was prepared to find, if it were necessary, that the *Porto Alexandre* was being used in ordinary commerce, and that the only interest of the Portuguese Government was in the earning of freight. But in his view the law as laid down in *The Parlement Belge* [5] was that a sovereign state could not be impleaded either by being served *in personam* or indirectly by proceedings against its property; and if that were the principle it mattered not how the property was being employed. His lordship continued: "I think, therefore, that this motion succeeds upon the ground that it is established that this ship was the property of the Portuguese Government at the time of arrest and is now its property. It therefore follows that so far as the ship and freight are concerned the writ and all subsequent proceedings must be set aside, but the writ and all subsequent proceedings so far as the cargo is concerned will remain good. I have already, in previous cases, pointed out what I conceive to be very strong reasons why it is undesirable that cases should be withdrawn, as this is being withdrawn, from the courts, but I have only to assert now what I conceive to be the law."

The plaintiffs appealed.

Argument for the appellants.

November 10. C. R. Dunlop, K. C., and J. B. Aspinall for the appellants. Although a sovereign ruler can not be impleaded even in respect of private transactions, international comity does not extend the same immunity to the property of states unless employed in the public service. The decision of the court of appeal in *The Parlement Belge* [5] no doubt qualifies to some extent the views of Sir Robert Phillimore as expressed in the court below in that case [6] and in *The Charkieh.* [7] But the court of appeal, in reversing Sir Robert Phillimore, took a different view of the facts, and the case is not an authority for the proposition that a foreign state-owned merchant ship

[5] 5 P. D. 197. [6] (1879) 4 P. D. 129. [7] (1873) L. R. 4 A. & E. 59, 74.

engaged on an ordinary mercantile voyage is immune from the process of arrest. The *Parlement Belge* was a mail boat, and although carrying passengers and cargo this was merely ancillary to her real employment, which was that of carrying the Belgian State mails. The correct view was that stated by Marshall, C. J., in an old American authority (*U. S. Bank* v. *Planters' Bank* [8]), that "when a Government becomes a partner in any trading company it devests itself, so far as concerns the transactions of that company, of its sovereign character." [*The Prins Frederik* [9] was also referred to.]

D. Stephens, K. C., and A. W. Grant for the respondents were not called on.

Bankes, L. J.: This is an appeal from a decision of Hill, J., who made an order that the writ and warrant for arrest, and all subsequent proceedings against the *Porto Alexandre* and freight, be set aside, but the proceedings against the cargo should stand. The learned judge was only concerned with the question of the ship, and this appeal has only reference to the ship.

The vessel in question was on a voyage from Lisbon to Liverpool, and she ran aground in the Mersey, and three tugs were engaged to get her off. An action was brought, and the ship was arrested in respect of the services rendered to her by these tugs. The application which the learned judge granted was founded upon the contention that the vessel was the property of a sovereign state, the Republic of Portugal, and on that ground, that she was exempt from arrest. The conclusion of fact at which the learned judge arrived was that it had been established that the ship was the property of the Portuguese Government at the time of the arrest, and is still their property, and on that ground he made the order.

It is now contended that it is not sufficient for a sovereign or a sovereign state to allege that a vessel is the property of such sovereign or sovereign state, and that the allegation must go further and say the vessel is employed in the public service or on public service.

Statement of facts.

The facts with regard to the vessel are as follows: She was originally a German merchant vessel, and in August, 1916, she was requisitioned by the Portuguese Government. On August 11 what is called a passport was issued, which authorized the employment of the vessel and contains

[8] (1824) 9 Wheat. 904, 907.

[9] (1820) 2 Dods. 451.

notes upon it, indicating that during the period that the vessel was at the service of the Portuguese Government, for which she was requisitioned, her port of register should be Lisbon. There is also an indorsement on the passport stating that on January 30, 1917, she was adjudged a lawful prize of war. Mr. Dunlop has pointed out that the statement that she was adjudged a lawful prize of war leaves it doubtful whether she has become the actual property of the Portuguese Government, or whether she was merely detained pending the conclusion of peace. It would rather appear that the latter is the proper conclusion, because there is an affidavit by the Portuguese vice consul at Liverpool, who says that the vessel is, and has been, requisitioned by the Portuguese Government for the service of the State, and is employed under the orders of the Government. There is a further statement in writing by the Portuguese consul at Liverpool, in which he says in reference to this particular voyage that the freight on the cargo was paid before shipment and belongs solely and entirely to the Portuguese Government. In addition to that, there is a letter from the Portuguese chargé d'affaires, in which he states definitely that the *Porto Alexandre* is a public service vessel belonging to the Portuguese Government.

There is no reason to doubt the accuracy of the statements that have been made on affidavit in this case—that the vessel has been requisitioned under the order of the Portuguese Government, and that on the particular voyage she was carrying freight for that Government. Mr. Dunlop, however, contends that is not sufficient, because it is shown she was engaged in what he says was an ordinary commercial undertaking, as an ordinary trading vessel carrying goods for a private individual or a private company. The question is, whether it is possible in the circumstances of this case to distinguish it from *The Parlement Belge*,[10] which was a decision of this court, and is binding upon us.

I gather from the judgment of Hill, J., and from what has been said by learned counsel, that this question is becoming one of growing importance. In the days when the early decisions were given, no doubt what were called Government vessels were confined almost entirely, if not exclusively, to vessels of war. But in modern times sovereigns and sovereign states have taken to

[10] 5 P. D. 197.

owning ships, which may to a still greater extent be employed as ordinary trading vessels engaged in ordinary trading. That fact of itself indicates the growing importance of the particular question, if vessels so employed are free from arrest.

The function of this court in this particular case is to decide whether it is covered by *The Parlement Belge*.[7] I think it is, and it is therefore not neccessary or desirable that the court should enter upon a discussion of the wider question at this stage, or consider the importance of other views that may be taken. There is very little difference between the material facts in *The Parlement Belge* and in the present case, and in my opinion *The Parlement Belge* is an authority which covers the present case. It is quite true that in many of the earlier cases the claim put forward, with regard to a particular ship, was that she was on public service and employed in the public service, and no doubt the statement so made was applicable to the particular case, and was made because it was applicable to the particular case, and the judgments were delivered in reference to the facts so stated. But in this case the court is bound by the decision in *The Parlement Belge* and the appeal must be dismissed with costs.

WARRINGTON, L. J.: I am of the same opinion. I think the case is clearly covered by the decision in *The Parlement Belge* [11], and, that being so, we have no alternative but to dismiss the appeal.

In the present case, the facts proved appear to me to amount to this: It is first proved that the ship in question is a public vessel, the property of the Portuguese Government; next it is proved by the affidavits that it is in their possession for the service of the State; and, thirdly, it is proved that it is employed under the orders of the Government. There is one passage in the judgment of Brett, L. J., in *The Parlement Belge* in which he is expressing what he considers to be the result of the judgment in *Briggs* v. *Light Boats* [12], an American case, of which he obviously approves and on which he founds his own conclusion. He says: "The ground of that judgment is that the public property of a Government in use for public purposes is beyond the jurisdiction of the courts of either

[11] 5 P. D. 197, 213, 217. [12] (1865) 93 Mass. 157.

its own or any other state, and that ships of war are beyond such jurisdiction, not because thay are ships of war, but because they are public property. It puts all the public movable property of a state, which is in its possession for public purposes, in the same category of immunity from jurisdiction as the person of a sovereign, or of an ambassador, or of ships of war, and exempts it from the jurisdiction of all courts for the same reason, viz, that the exercise of such jurisdiction is inconsistent with the independence of the sovereign authority of the state." And then again, when he is summing up the principle which he thinks is to be deduced from all the cases, he says: "As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise, by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or"—and these are the material words—"over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

Whatever may be the actual use to which this ship is put, I think the evidence is quite sufficient to show that it is the property of the state, and is destined to public use; and, that being so, the case seems to me to come exactly within the principle of the judgment in *The Parlement Belge* [13], with the result which I indicated at the beginning of my judgment.

Scrutton, L. J.: In this case the *Porto Alexandre* came into the Mersey, got on to the mud, and was salved by three Liverpool tugs. On arresting her to obtain security for the payment of their salvage, the Portuguese Republic, through the Portuguese chargé d'affaires, put forward a statement that she was a public vessel of the Portuguese Republic, and was therefore exempt from any process in England. Accordingly the defendants moved to set aside the writ and arrest. Hill, J., in the admiralty court granted the application, and the plaintiffs' appeal to this court.

[13] 5 P. D. 197.

Now, this State and other States proceed in their jurisprudence on the assumption that sovereign States are equal and independent, and that as a matter of international courtesy no one sovereign independent State will exercise any jurisdiction over the person of the sovereign or the property of any other sovereign State; and now that sovereigns move about more freely than they used to, and do things which they used not to do, and now that States do things which they used not to do, the question arises whether there are any limits to the immunity which international courtesy gives as between sovereign independent States and their sovereigns. I think it has been well settled first of all as to the sovereign that there are no limits to the immunity which he enjoys. His private character is equally free as his public character. If he chooses to come into this country under an assumed name and indulge in privileges not peculiar to sovereigns, of making promises of marriage and breaking them, the English courts still say on his appearing in his true character of sovereign and claiming his immunity, that he is absolutely free from the jurisdiction of this court. That is the well-known case of *Mighell* v. *Sultan of Johore.*[14] It has been held, as Mr. Dunlop admits, in *The Parlement Belge*[15] that trading on the part of a sovereign does not subject him to any liability to the jurisdiction. His ambassador is in the same position; an ambassador, coming here as an ambassador of the sovereign may engage in private trading, but it has been held that his immunity still protects him even from proceedings in respect of his private trading. Jervis, C. J., in *Taylor* v. *Best,*[16] said: "* * * if the privilege does attach, it is not, in the case of an ambassador or public minister, forfeited by the party's engaging in trade, as it would, by virtue of the proviso in the 7 Anne, chapter 12, section 5, in the case of an ambassador's servant. If an ambassador or public minister, during his residence in this country, violates the character in which he is accredited to our court by engaging in commercial transactions that may raise a question between the government of this country and that of the country by which he is sent; but he does not thereby lose the general

Immunity.

[14] [1894] 1 Q. B. 149. [15] 5 P. D. 197. [16] (1854) 14 C. B. 487, 519.

privilege which the law of nations has conferred upon persons filling that high character, the proviso in the statute of Anne limiting the privilege in cases of trading applying only to the servants of the embassy." There being no limitation in the case of the sovereign, and no limitation in the case of the ambassador, is there any limitation in the case of the property? Mr. Dunlop has argued before us that in the case of property of the State there is a limitation, and that—as I understand him—if the property is used in trading, that can not be for the public service of the State. That is not the way in which he expressed it, but it appears to me to be the proposition which emerges from his argument.

We are concluded in this court by the decision in *The Parlement Belge*.[17] Sir Robert Phillimore took the view that trading with the property of a state might render that property liable to seizure; but the court of appeal in *The Parlement Belge* overruled the views of Sir Robert Phillimore, as I understand them. The principle then laid down has been recited by the other members of the court. Brett, L. J., said: "As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use." One of the reasons given seems to me conclusive: the moment property is arrested in the admiralty court a proceeding is instituted against the person, and the person is compelled to appear if he wants to protect his property, and by seizing his property the personal rights of the sovereign or the personal rights of the state are interfered with. The position seems to me to be very accurately stated in the seventh edition of Hall's International Law, at page 211, where, after dealing with warships and public vessels so called, Mr. Hall goes on to deal with other vessels employed in the public service and property possessed by the state within foreign jurisdiction, and says: "If in a question with respect to property coming before the courts a foreign state shows the property to be its own, and claims delivery, juris-

[17] 5 P. D. 197, 217.

diction at once fails, except in so far as it may be needed for the protection of the foreign state."

I quite appreciate the difficulty and doubt which Hill, J., felt in this case, because no one can shut his eyes, now that the fashion of nationalization is in the air, to the fact that many states are trading, or are about to trade, with ships belonging to themselves; and if these national ships wander about without liabilities, many trading affairs will become difficult; but it seems to me the remedy is not in these courts. *The Parlement Belge* excludes remedies in these courts. But there are practical commercial remedies. If ships of the State find themselves left on the mud because no one will salve them when the State refuses any legal remedy for salvage, their owners will be apt to change their views. If the owners of cargoes on national ships find that the ship runs away and leaves them to bear all the expenses of salvage, as has been done in this case, there may be found a difficulty in getting cargoes for national ships. These are matters to be dealt with by negotiations between governments, and not by governments exercising their power to interfere with the property of other States contrary to the principles of international courtesy which govern the relations between independent and sovereign States. While appreciating the difficulties which Hill, J., has felt, I think it is clear that we must, in this court, stand by the decision already given, and the appeal must be dismissed.

THE "TERVAETE"

[1922] P. 259]

Shipping—Collision—Foreign state-owned vessel—Maritime lien—Vessel sold into private ownership—Jurisdiction—Immunity from arrest

Damage occasioned by collision with a foreign state-owned vessel does not impose a maritime lien upon the vessel, and if the vessel be subsequently sold into private ownership she is not then liable to arrest in an action in rem.

Decision of Duke, P., reversed.

Appeal from a decision of Sir Henry Duke, P., sitting in admiralty, dismissing a motion to set aside a writ in an action *in rem*.

The appellants, defendants in the action, were the owners of the steamship *Tervaete;* the respondents were the owners of the steamship *Lynntown.*

The action was brought to recover damages in respect of a collision which took place between the *Lynntown,* a British vessel, and the *Tervaete* on May 18, 1920, in the port of Bonanza, on the Guadalquivir River. At that time the *Tervaete* belonged to the Government of the King of the Belgians and was being run as a coal ship for public purposes. After the collision she was sold by the Belgian Government into private ownership, and at the time of the commencement of the present proceedings she was the property of the Société Anonyme Belge d'Armement et de Gérance. The plaintiffs issued and served their writ on January 10, 1922, the *Tervaete* being then in Barry Dock; but they refrained from arresting her in consideration of an undertaking by the solicitors for the defendants to enter an appearance and put in bail. Appearance was entered under protest, and a motion was then set down by the defendants to discharge the solicitors' undertaking and to set aside the writ.

Duke, P., held that a foreign state by its authorized agents could impose a lien upon one of its public ships, and that the lien might be enforced if it could be done without directly or indirectly impleading the foreign state. He was of opinion that the maritime lien in the present case was capable of being enforced without any assertion of jurisdiction over the Belgian State or its property, and accordingly dismissed the motion. The defendants appealed.

Argument for the appellants.

Bateson, K. C., and E. Aylmer Digby for the appellants: The court had no jurisdiction to entertain the action. As a state-owned vessel is immune from arrest, no maritime lien can attach to her, and if it never attached it can not revive when the vessel is sold into private ownership. A maritime lien does not attach in every case of collision—e. g., collisions caused through the barratrous acts of the master or, before the pilotage act, 1913, by the negligence of a compulsory pilot, do not give a right of action against the owners: See also *The Tasmania* [17] as to the position of vessels under charter.

[Scrutton, L. J. This collision took place in a Spanish port; before the admiralty court act of 1861 the court would not have entertained such an action: *The Ida.*[18]]

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[17] (1888) 13 P. D. 110.

[18] (1860) Lush. 6.

No. It has, however, been held that Alexandria and Algiers are "on the high seas," because they are not within the body of a country: *The Mecca.*[19]

Maritime lien.

A maritime lien is not a lien at all; it is a claim to priority involving an action *in rem* and therefore impleads the owner of the *res.* It was defined in *The Bold Buccleugh* [20] as "a claim or privilege to be carried into effect by legal process;" and in *Currie* v. *McKnight* [21] Lord Watson described it as a remedy against the corpus of the offending ship; see also *The Dictator* [22] and *The Ripon City,*[23] where the nature of a maritime lien was fully discussed. The collision with the *Lynntown* gave her owners no claim against the then owners of the *Tervaete* which could be carried into effect by legal process; and Brett, L. J., said in *The Parlement Belge* [24] that "the property can not be sold as against the new owner, if it could not have been sold as against the owner at the time." Similarly in *The Castlegate* [25] Lord Watson said that the general principle of maritime law was that "inasmuch as every proceeding in rem is in substance a proceeding against the owner of the ship, a proper maritime lien must have its root in his personal liability;" and Sir Francis Jeune in *The Utopia* [26] made similar observations. The president, therefore, was wrong in holding that there was a maritime lien capable of being given effect to without impleading the foreign state. A dormant maritime lien attaching to a state-owned vessel necessarily diminishes the value of the state's property. A maritime lien is, in the words of Barnes, J., in *The Ripon City,*[23] a jus in re aliena, and to allow such a lien to attach at all would be a subtraction from the absolute property of the owner. The cases in which there have been cross claims against a foreign sovereign or sovereign states—e. g., *The Newbattle* [27]—stand in a different category; for if a foreign sovereign sues in a British court he submits himself to the jurisdiction of the court, and the court naturally will see that justice is done. If, therefore, there is a counter-claim or cross action the court, if necessary, will order the foreign

[19] [1895] P. 95.
[20] (1851) 7 Moo. P. C. 267, 284.
[21] [1897] A. C. 97, 106.
[22] [1892] P. 304.
[23] [1897] P. 226.
[24] (1880) 5 P. D. 197, 218.
[25] [1893] A. C. 38, 52.
[26] [1893] A. C. 492.
[27] (1885) 10 P. D. 33.

sovereign to give security: *The Newbattle* [27]. While there is no English authority on the question at issue, it arose recently in the United States, and the Supreme Court decided by a majority that no maritime lien attached in the case of collision with a Government-owned vessel: *United States of America, Owners of the Western Maid* v. *Auxiliary Schooner Liberty and Steamship Carolinian.*[28]

[Reference was also made to *The Aline* [29] and, on the position of requisitioned vessels, *The Broadmayne.*[30]]

Argument for the respondents.

C. R. Dunlop, K. C. and Dumas for the respondents: There are two questions involved. Has the admiralty court jurisdiction to entertain the action at all; and if it has, is there any ground why it should refuse to do so? As regards the locus, there can be no question that the admiralty court act, 1861, gives the court jurisdiction over cases of collision in foreign inland waters, whether the vessels concerned are British, *The Diana*; [31] or foreign, *The Courier.*[32] The argument of the appellants confuses the position of the British Crown, which can do no wrong, cf. *Tobin* v. *The Queen*,[33] with the position of a foreign sovereign, in favor of whom there is no such axiom. A foreign sovereign is not incapable of committing a tort. In *Mighell* v. *Sultan of Johore* [34] it was not suggested that the Sultan could not create against himself a good cause of action, nor in *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord* [35] that the Republic could not commit a libel. Also, a foreign sovereign who is plaintiff is liable to have a counterclaim or cross-action brought against him: *The Newbattle.*[27]

[Bankes, L. J. In *The Newbattle* [27] the court said it could not order the vessel to be seized.]

No, but the foreign sovereign was compelled to give security to answer the cross action: see also *Strousberg* v. *Republic of Costa Rica.*[36] In *Magdalena Steam Navigation Co.* v. *Martin*,[37] in which the position of an ambassador was considered, the case appears to have proceeded on the footing that the remedy was in suspension.

[Scrutton, L. J., referred to *Musurus Bey* v. *Gadban.*[38]]

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[27] (1885) 10 P. D. 33.
[28] [257 U. S. 419].
[29] (1839) 1 W. Rob. 111.
[30] [1916] P. 54.
[31] (1862) Lush. 539.
[32] (1862) Lush. 541.
[33] (1864) 33 L. J. (C. P.) 199.
[34] (1894) 1 Q. B. 149.
[35] (1897) 2 Ch. 487.
[36] (1880) 44 L. T. 199.
[37] (1859) 2 E. & E. 94.
[38] (1894) 2 Q. B. 352.

On the second point, namely, whether the Court ought to exercise jurisdiction, it will do so unless a claim of sovereignty is asserted, and the claim must be asserted by the foreign sovereign or some one on his behalf. It is not suggested by the secretary to the Belgian ambassador that the Belgian Government objects to the action against the *Tervaete;* the affidavit in support of the motion to set aside the writ is made by the Belgian vice consul at Cardiff acting on behalf of the appellants, a commercial firm. The president was right in his conclusion that the maritime lien could be enforced without impleading the foreign government. The date when the action is brought and not the date of the contract or tort is the material date: *Munden* v. *Duke of Brunswick.*[39] The rule in *The Parlement Belge* [40] is not infringed by the present action; and the dictum of Brett, L. J., in that case, relied on by the appellants, is obiter, and further had reference to a different state of facts—the lord justice was discussing whether a lien could attach to a ship in the hands of a subsequent owner when there was no negligence on the servants of the owners at the time of the collision.

[Reference was also made to *The Ticonderoga* [41] and *The Porto Alexandre.*[42]]

Digby in reply: The fallacy in the respondents' case is their contention that there is a distinction between the case of an action against the British Crown and an action against a foreign sovereign or state, and that in the latter case the court merely declines to exercise jurisdiction, while in the former it is admitted that the court has no jurisdiction to entertain the action at all. Both cases stand on the same footing. There is no jurisdiction in either case: See *The Constitution,*[43] where the defendants being a foreign state it was held that the court had no jurisdiction to entertain the action: See also the report of *The Parlement Belge* in the admiralty court,[44] where the attorney general's protest is set out, from which it appears that the point taken was absence of jurisdiction.

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[39] (1847) 4 C. B. 321; 10 Ad. & E. 656.
[40] 5 P. D. 197, 218.
[41] (1857) Swa. 215.
[42] [1920] P. 30.
[43] (1879) 4 P. D. 39.
[44] 4 P. D. 129, 131.

Statement of facts.

July 12. The following judgments were read:

BANKES, L. J.: The material facts lie in a small compass. In May, 1920, a collision occurred between the respondents' vessel, the *Lynntown*, and the *Tervaete*, which at that time was the property of the Belgian Government and employed on Government service. Subsequently to the collision the Belgian Government transferred the *Tervaete* to a private owner, and after she had been so transferred she came into Barry Dock. The respondents contend that as a result of the collision a maritime lien attached to the *Tervaete*, which, now that she is private property and is found within the jurisdiction, they are entitled to enforce by proceedings *in rem* in the admiralty court of this country. The present proceedings were taken by the respondents to test the correctness of that contention. The respondents do not contest the proposition that as a general principle of maritime law, in the case of a claim for damage arising out of collision, a proper maritime lien must have its root in the personal liability of the owner, or of the person for this purpose in the position of owner. The subject is very fully discussed by Gorell Barnes, J., in *The Ripon City*,[45] in which he gives a definition of maritime lien in language which is, I think, of assistance in this case. He says: "Such a lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another—a *jus in re aliena*. It is, so to speak, a subtraction from the absolute property of the owner in the thing. This right must, therefore, in some way have been derived from the owner either directly or through the acts of persons deriving their authority from the owner." The respondents further do not dispute that, so long as the *Tervaete* remained the property of the Belgian Government, no proceedings could be taken either *in personam* or *in rem* in respect of the damage done to their vessel by the collision.

The contention upon which the respondents relied in the court below, and which was accepted by the president, was that the fact that no such proceedings could be taken was not due to an absence of any liability on the part of the Belgian Government for the negligence of

[45] [1897], pp. 226, 242.

their servants which brought about the collision, but to the rule introduced by international comity which prohibited the taking of any proceedings to enforce that liability. As a further contention founded upon the one just mentioned, it was said that a maritime lien did attach to the *Tervaete* as a consequence of the collision, and though it remained, as it were, dormant and unenforceable during the ownership of the vessel by the Belgian Government, it became enforceable when the vessel passed into private ownership. These contentions raise the question whether a maritime lien ever did attach to the vessel at a time when she was owned by the Belgian Government. This is quite a different case from a case where a maritime lien attached to a vessel at a time when she was privately owned, and which vessel afterwards passed into government ownership, and then into private ownership again. It may well be that in such a case the maritime lien is dormant during the period of government ownership. The present case is quite distinct from that, and involves the question whether a maritime lien ever attached to the *Tervaete* at all.

Liability of foreign sovereign.

I think it may be conceded for the purposes of the argument that the fact that a sovereign or a sovereign power can not be proceeded against in the courts of a foreign country does not exclude all idea of liability for a breach of contract, or for a tort, in the sense that under no circumstances can the sovereign or the sovereign state do wrong. The rule that where a foreign sovereign sues in the courts of this country, proceedings may be taken against him in mitigation of the relief claimed by him, would be of no value except upon the assumption that claims for breaches of contract, or for torts, might be established and set off in mitigation. In *Imperial Japanese Government* v. *P. & O. Co.*,[46] the whole discussion as to the court in which proceedings might be taken would have been avoided had the law been that the Emperor of Japan could not be liable for damages resulting from the collision of his vessel with that of the defendants. The point was, however, not suggested in that case. In *The Newbattle*[47] it was assumed that the King of the Belgians might be held liable in damages in the cross cause for the negligence of those in charge of his vessel, the *Louise Marie*. The fact that the immunity of an

[46] [1895] A. C. 644.

[47] 10 P. D. 33.

ambassador from process in the courts of this country in respect of debts contracted while he was ambassador lasts during the time during which he is accredited to the sovereign and for such a reasonable period after he has presented his letters of recall to enable him to wind up his official business and to prepare for his return home, which is the law as laid down in *Musurus Bey* v. *Gadban*,[48] points also in my opinion to the same conclusion. In the numerous cases such as *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord*,[49] in which the question arose of enforcing cross claims in actions by sovereigns or sovereign states, it appears to me to be assumed that the cross claims are in respect of breaches of conduct or of tort actually committed, and for which the sovereign or the sovereign state would have been responsible but for the immunity from process which he or they enjoyed.

In spite of the fact that so far I have accepted the arguments of the respondents in support of the judgment of the President, I am unable to agree with his final conclusion, and I do so upon a point to which his attention does not appear to have been specially directed. The point is founded partly upon the effect upon the property of the sovereign state if a maritime lien attached to the *Tervaete* as alleged, and partly upon a consideration of the nature of a maritime lien itself. If the judgment of the president is right, and the maritime lien attached to the *Tervaete*, the value of the vessel to the Belgium Government must necessarily have been affected; how seriously of course depends upon the amount of the respondents' claim. A vessel to which a maritime lien extends for any substantial amount must necessarily be worth less in the market than if she was free from any lien. In *The Bold Buccleugh* [50] Sir John Jervis, when dealing with the question of a maritime lien, adopts Lord Tenterden's definition of it, as a claim or privilege to be carried into effect by legal process; and he then goes on to say that a maritime lien is the foundation of the proceedings *in rem*, a process to make perfect a right inchoate from the moment the lien attaches. In *Currie* v. *McKnight* [51] Lord Watson speaks of a maritime lien as a remedy against the corpus of the offending ship.

[48] [1894] 2 Q. B. 352.
[49] [1898] 1 Ch. 190.
[50] 7 Moo. P. C. 267, 284.
[51] [1897] A. C. 97, 106.

Whether a maritime lien is properly to be regarded as a step in the process of enforcing a claim against the owners of a ship, or as a remedy or partial remedy in itself, or as a means of securing a priority of claim, it can not, in my opinion, consistently with the rule of immunity laid down by the law of nations, be attached to a vessel belonging to a sovereign power and being used for public purposes. To allow such a lien to attach would be to use Gorell Barnes, J.'s, language in *The Ripon City*,[52] to create a *jus in re aliena*, a subtraction from the absolute property of the sovereign state.

I may here refer to *Musurus Bey* v. *Gadban* [53], in which the immunity from process of an ambassador was considered. It was argued in that case that it was permissible to issue a writ against an ambassador in order to prevent the running of the statute of limitation, provided no further step of serving or attempting to serve was taken. The court, taking the same view as was taken in *Magdalena Steam Navigation Co.* v. *Martin*,[54] refused to accept the contention. Davey, L. J., said: "With regard to the first" (that is the contention I have just referred to) "it is in my opinion sufficient to refer to the third section of 7 Anne, chapter 12, which makes all writs and processes, whereby the person of any ambassador or other public minister may be arrested or imprisoned, or his goods and chattels may be distrained, seized, or attached, utterly null and void. It has been decided in *Magdalena Steam Navigation Co.* v. *Martin* [54] that this section applies not only to writs of execution against the property or person of a privileged person, but also to writs which lead up to and would in ordinary course have the consequence of attaching his goods or person. If so, I am of opinion that a writ of summons in an action is of that character, and that the effect of the statute (which is said to be declaratory only of the common law) is to make such a writ void and of no effect. Mr. Pollard is quite right in saying that the writ had been served in the *Magdalena case*, and that all that it was necessary to decide was that that service was bad. But the grounds upon which the decision was based in Lord Campbell's judgment go beyond that point, and in my opinion show a total want of jurisdiction of the court to entertain the action at all.

[52] [1897], p. 226. [53] (1894) 2 Q. B. 352, 360. [54] 2 E. & E., 94,

Lord Campbell, at page 111, states the principle to be that for all juridical purposes an ambassador is supposed still to be in his own country, and he concluded his judgment in these words: 'It certainly has not hitherto been expressly decided that a public minister duly accredited to the Queen by a foreign state is privileged from all liability to be sued here in civil actions; but we think that this follows from well-established principles.' These passages, in my opinion, correctly state the legal principles on which the exemption is founded, and are in accordance with the course of decisions in our courts: See, for example, the latest case of *The Parlement Belge* in the court of appeal, in which it was said (I am reading from the marginal note, which is fully borne out by the judgment) that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each state declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory. I am unable to think that the issue of a writ in an action which action the court has no jurisdiction to entertain, and which writ, therefore, the court has no jurisdiction to issue, can prevent the statute running."

It seems to me impossible consistently with the law as there expressed to hold that it is permissible to recognize a maritime lien as attaching to the property of a sovereign or a sovereign state. I see no distinction in principle between the act of the individual issuing the writ and the act of the law attaching the lien. Each equally offends the rule affording immunity. If this is the correct view of the law then the appellants are entitled to succeed, because unless a maritime lien attached to the *Terraete* while she was the property of the Belgian Government it can not attach at all. In my opinion the appeal must be allowed with costs here and below and the order made with costs relieving Messrs. Downing and Handcock of their undertaking dated January 12, 1922, and setting the writ aside and staying all proceedings thereunder.

Judgment.

SCRUTTON, L. J.: In May, 1920, the English steamer, *Lynntown*, being in the Spanish port of Bonanza on the Guadalquivir River and within Spanish territorial waters, but on the "high seas," as that term is interpreted in the English admiralty court, sustained damage by collision with the steamship *Tervaete*. The *Tervaete* had been surrendered by the German Government to the allied powers, who handed her over to the Belgian Government, whose property she was at the time of the collision. After the collision the Belgian Government sold the *Tervaete* to private owners, under whose ownership she came to Barry Dock where she was arrested by a procedure *in rem* at the suit of the owners of the *Lynntown*. They alleged that the collision gave rise to a maritime lien, inchoate till the *Tervaete* came within British territorial waters, dormant till she ceased to be the property of the Belgian Government, but which could be enforced when the *Tervaete*, as the property of private owners, came within British jurisdiction.

The owners of the *Tervaete* replied that as the *Tervaete* at the time of the collision was the property of the Belgian Government, against whom no proceedings could be taken *in personam* and against whose ship no proceedings could be taken *in rem*, no maritime lien could arise. The president, in a reserved judgment, adopted the contention of the owners of the *Lynntown*, and the owners of the *Tervaete* appeal.

In my view it is now established that procedure *in rem* is not based upon wrongdoing of the ship personified as an offender, but is a means of bringing the owner of the ship to meet his personal liability by seizing his property. The so-called maritime lien has nothing to do with possession, but is a priority in claim over the proceeds of sale of the ship in preference to other claimants. It does not appear *eo nomine* in cases of collision in the reports till *The Bold Buccleugh* [55] was heard in 1851, where it is defined as a claim or privilege upon a thing to be carried into effect by legal process; and it is stated, erroneously as is now admitted, that wherever an action *in rem* lies there a maritime lien exists. The report proceeds: "This claim or privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when

[55] 7 Moo. P. C. 267, 284.

carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached."

The cases as to the relation of a maritime lien to the personal liability of the owner are exhaustively examined by the late Lord Gorell in *The Ripon City*.[56] He comes to the conclusion that a maritime lien may exist, though the owner is not personally liable, where there is personal liability in those to whom he has voluntarily intrusted the control of the vessel, as charterers, though not if his intrusting is compulsory, as in the case of compulsory pilots. But for a lien to arise, in my view, some person having by permission of the owner temporary ownership or possession of the vessel must be liable for the collision. If he is so liable, a privilege or lien at once arises in this sense, that if the vessel comes within English territorial waters it may be arrested, and the claim or privilege on it will date back to the time of the lien. Any purchaser after the collision takes the ship subject to this possibility of claim.

At the time of the collision, if it happened in English waters, would it have been possible to arrest the *Tervaete* and claim a maritime lien? The well-known decision of *The Parlement Belge* compels the answer in the negative. Neither the Belgian Government could have been sued *in personam*, nor could their ship have been arrested *in rem*. If this is so, I do not understand how there could then be any maritime lien on the ship. To hold that a lien would come into existence, if the Government sold the ship to a private purchaser, would be to deprive the Belgian Government of part of their property, for such a lien about to arise must reduce the price paid to the Government and so affect the property of the Government.

The general language of Lord Watson in *The Castlegate*,[57] that "a proper maritime lien must have its root in the personal liability of the owner," approving the language of Lord Esher to the same effect in *The Parlement Belge*, and the similar language of Sir Francis Jeune in *The Utopia*,[58] appear to me entirely to support this view, even if that general language is not applicable, as Gorell Barnes, J., in *The Ripon City*[59] thought it was

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[56] [1897] P. 226.
[57] [1893] A. C. 38, 52.
[58] [1893] A. C. 492, 499.
[59] [1897] P. 226.

not, to the complicated facts in that case. And while I agree with the president that the passage in *The Parlement Belge* [60] was not strictly necessary to Brett, L. J.'s, decision, yet it was so closely related to it that coming from such a master of maritime law I have no hesitation in following it, especially as I agree with it in principle. Brett, L. J., says: "The property can not be sold as against the new owner, if it could not have been sold as against the owner at the time when the alleged lien accrued. This doctrine of the courts of admiralty goes only to this extent, that the innocent purchaser takes the property subject to the inchoate maritime lien which attached to it as against him who was the owner at the time the lien attached." In the present case no lien attached against the Belgium Government, nor could their ship have been arrested *in rem.* But if they could only sell the ship subject to the lien, their property would be affected by the lien, in that they would receive less than the value of the ship free from encumbrances or liens. The result would be that our law would assert a right over the property of a foreign sovereign not arising from any voluntary action on his part, which adversely affected his property.

I agree that a sovereign may call upon us to enforce legal rights in his favor. *The Newbattle* [47] shows that if he does so, we may refuse to enforce those rights unless he allows the legal rights we recognize to be effectively enforced against him. I agree that cases like *Gladstone* v. *Musurus Bey* [60] and *Larivère* v. *Morgan* [61] show that where English trusts are concerned, this court will proceed though foreign sovereigns' rights are concerned, while, on the other hand, *Vavasseur* v. *Krupp* [62] involves the proposition that this country will not enforce English patent rights against property in the jurisdiction which a foreign sovereign claims. I am disposed to agree that the ground of the decisions is that, though there are English rights, we do not enforce them against a foreign sovereign directly or indirectly because of the comity of nations. But it respectfully appears to me that the error of the president's judgment is that he is enforcing rights against a foreign sovereign indirectly, when he supports the view that over his

[47] 10 P. D. 33.
[60] (1862) 1 H. & M. 495; 32 L. J. (Ch.) 155.
[61] (1872) L. R. 7 Ch. 550.
[62] (1878) 9 Ch. D. 351.

property there is by English law an inchoate lien which will diminish the value of that property by lowering the price that a private purchaser will give for it.

I appreciate that the matter becomes of international importance, if States increase their commercial trading by national fleets. I have already in *The Porto Alexandre* [42] expressed my views on the disadvantage of State immunity in such circumstances. But the remedy is, in my opinion, State agreements by diplomatic action, not infringement of legal principles based on the comity of nations.

For these reasons I think the appeal must be allowed with costs here and below, and the writ against the *Tervaete* set aside.

ATKIN, L. J.: This case raises a question of considerable importance. I have found it difficult, and I differ from the reasoning of the learned president with hesitation; but having formed a judgment which is not in agreement with his conclusion I must express it.

I understand the argument made by the respondents and enforced by the president to be this. Collision damage caused by the negligent navigation of a ship creates a right in the person injured to recover damages from the owner responsible for the navigation. It also creates a right in the person injured to a maritime lien over the ship, so causing damage. That lien is not a possessory lien; but consists of the right by legal proceedings in an appropriate form to have the ship seized by officers of the court and made available by sale if not released on bail to pay the collision damage. If the ship is the property of a foreign sovereign it is admitted that legal proceedings can not be commenced against him either personally or *in rem*—i.e., for the arrest of the ship—because by comity of nations no process can be brought in the courts against the person or the property of a foreign sovereign. But this is only a personal privilege of the sovereign not to be impleaded. The right of the injured person to damages and to a lien still exists; and as the right to a lien is not abrogated when the ship is transferred into the property of a third person, so when the ship formerly owned by the foreign sovereign becomes the property of a third person not protected by the personal privilege of the sovereign, the right to a lien becomes effective, and the necessary proceedings *in rem*

[42] [1920] P. 30.

may be taken against the ship. The right to a maritime lien, it is said, is equivalent to a charge created by the voluntary hypothecation of a chattel by the sovereign, a charge which may not be capable of enforcement while the chattel is in the possession or ownership of the sovereign, but can be enforced as soon as it is transferred to the property of a third person.

A part of this reasoning is irresistible. It seems to me correct to say that the acts of a foreign sovereign may constitute breaches of contract or of duty not arising from contract which create rights in the other party. True, such rights may be of little value, as they can not ordinarily be enforced by action. But the inability is a mere personal inability to sue; they can be made effective in defense as, for instance, by set-off where the rights give rise to a power of set-off; and, as I should suppose, by a plea of contributory negligence; and should the sovereign submit to the jurisdiction in respect of a claim based upon such rights, I apprehend that the court would be bound to give effect to them.

But in my judgment upon a true analysis of what is meant by a maritime lien the right to such a lien is not such as can be created at all by the act of a sovereign. It is not a right to take possession or to hold possession of the ship. It is confined to a right to take proceedings in a court of law to have the ship seized, and, if necessary, sold. The action *in rem* is an action in which the owners of the ship are named as parties to the proceedings and in which, according to our procedure, if they appear, subject to the statutory right to limit liability, they will be made liable personally for the full damage regardless of the value of the *res*. The owner, therefore, in such an action is directly impleaded. But whether it be directly or indirectly, the owner who is a foreign sovereign can not be impleted at all. The result appears to me to be that the maritime lien against a foreign sovereign can not exist at all. A right which can only be expressed as a right to take proceedings seems to me to be denied where the right to take proceedings is denied. No independent liability of the sovereign such as a liability for debt or damages remains pendent protected only by an immunity from legal proceedings. The right of maritime lien appears, therefore, to be essentially different from a right of property hypothec or pledge created by the

voluntary act of the sovereign. If this reasoning be correct, inasmuch as there never was a time during the ownership of the Belgian Government when the respondents could aver that they possessed a maritime lien over the *Tervaete*, there was no obligation which attached to the ship or to the new owners when the ship became their property. On the explanation of the origin of a maritime lien given by Jeune, P., in *The Dictator*,[63] one may perhaps be allowed to wonder how such a right avowedly dependent upon the personal liability of the owner could be held to be enforceable against a new owner not in any way personally liable for the collision. It is too late to raise a doubt as to this point after the decision of *The Bold Buccleugh*.[64] But where there was no right against the old owner, the new owner must escape. I myself should in any case feel bound by the dictum of Lord Esher in *The Parlement Belge*,[7] referred to in the judgment of the president.

I have thought it necessary to state my views on this difficult question in my own way, because I am not sure that I feel so much pressed as my brothers with the contention that a dormant maritime lien over a foreign sovereign's ship would affect the value of the ship in his hands, and therefore must be negatived. The supposition that the liability existed as for personal claims, but was merely unenforceable, does not seem necessarily to be invalidated by the fact that such liability would impose pecuniary disadvantages upon the sovereign. A voluntary pledge or hypothec would be attended with the same results, but would it not be valid? I do not, however, dissent from their view. I concur in the views taken by my brothers of the cases cited by them and of their bearing on this case. I only desire to add a word or two on *The Newbattle* [47] in the court of appeal. There the court held that upon the construction of the admiralty court act, 1861, where a foreign Government had brought an action *in rem* against the owners of the *Newbattle*, an order could be made staying the action until security had been given by the plaintiffs to answer the cross claim of the defendant in respect of the same collision. The relevance of the case is that under the section a condition precedent of such an order is that the plaintiffs' ship can not be

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[7] 5 P. D. 197.
[47] 10 P. D. 33.
[63] [1892] P. 304.
[64] 7 Moo. P. C. 267.

arrested, and the decision of the court proceeds upon the ground that though the foreign sovereign had invoked the jurisdiction of the court and though he was under possible liability for damages in an effective cross suit, yet his ship was exempt from arrest. That a maritime lien was not enforceable under such circumstances appears to afford strong support for the view that it did not exist at all.

For these reasons I think the appeal must be allowed and the order made as stated by Bankes, L. J.

Appeal allowed.

THE "ISLAND"

January 30, 1918

(2 Entscheidungen des Oberprisengerichts in Berlin, 8)

In the prize matter concerning the Danish steamer *Island,* home port Copenhagen, the imperial superior prize court in Berlin in its session of January 30, 1918, decreed:

The appeal against the judgment of the prize court in Kiel of May 30, 1917, is dismissed. The costs of the appeal are to be borne by the claimant. The further complaint of the owners against the decision of December 12, 1919, of the prize court in Kiel is hereby disposed of.

Reasons:

Statement of the facts.

The Danish steamer *Island,* on the way from Copenhagen to New Castle in ballast, was brought to by a German war vessel on December 2, 1916, and, for purposes of a more thorough search, was taken in to Swinemunde, where seizure in prize followed on December 12, 1916.

The vessel, built in Glasgow in the year 1894, came into Danish possession in the year 1900, and, after frequent changes of ownership and name in Denmark, was sold by an agreement of November 24, 1915–July 21, 1916, by the then owner, the Steamer Island Corporation, in Copenhagen, to the claimant, Atlantic Ocean Steamship Co., a corporation in Copenhagen. The vessel, which formerly was called *Esrom,* was rechristened *Island* by the predecessor of the plaintiff. The Island Co. bought the ship in December, 1914, for 275,000 crowns; the claimant bought it for 1,000,000 crowns. According to an appraisal made at the instigation of the claimant by

three experts named by the admiralty and commercial court in Copenhagen, presented to the court of first instance, the ship is supposed to be now worth 3,120,000 crowns.

Capture by English.

In October, 1915, the ship, at that time still under the name of *Esrom*, while on a voyage from America to Sweden, was captured by the English and ordered to Hull. The English thought there was ground for the assumption that the vessel was in whole or in part German property.

Thereupon the English Admiralty, after the ship had lain idle a while, requisitioned her, despite the protest of the owners and of the Danish Government, and sailed her under the English flag from January to July, 1916.

Conditional release.

In August, 1916, the release of the vessel was accomplished on the condition that she be chartered to an English firm, and on August 16, 1916, having in the meantime been taken over by the present claimant, she set sail for Copenhagen from London, where she had lain. Here she was to be docked and undergo extensive repairs, for which there had been no opportuinity in England.

Charter to English firm.

By an agreement of August 23, 1916, the ship was chartered by the claimant to the firm of Furness, Withy & Co., Liverpool, as of September 30 at the latest. It is provided in the charter party that under certain conditions the time of delivery to the charterer may be extended still further. On December 2, 1916, after partial repairs, the vessel set out in ballast for England, and on this trip was stopped by a German war vessel. These facts, in part cleared up for the first time in the court of second instance, are incontestable in view of the records.

Claim was raised by the Atlantic Ocean Steamship Co. in Copenhagen for the release of the steamer, or compensation to the extent of 3,120,000 crowns. The claim was based on the ground that the ship as neutral was not subject to capture; more especially that the fact that for six months she had sailed under the English flag under compulsion had not brought about a change of flag.

Decision of Kiel prize court.

By decision of the prize court at Kiel on May 30, 1917, the claim was rejected, and confiscation of the vessel decreed. The prize court stands upon the ground that in truth the illegal requisitioning on the part of the English Admiralty, and the ensuing use under the English flag, did not change the nationality of the ship. It as-

sumed, however, that the charter of the ship to the firm of Furness, Withy & Co. was already running at the time of the arrest, and that this contract of charter was tantamount to a charter to the English Government, inasmuch as it was known to the prize court, through secret information to the German Admiralty staff from a reliable source, that that English firm was an agent of the English Government. It was therefore to be presumed, until the contrary was proved, that a chartering to the English Government had been consummated.

This would be conclusive in the terms of article 55 c of the Prize Code.

Terms of charter party.

Against this decision the claimants have appealed. They deny that at the time of capture the ship was under charter to the English. According to the charter party, which was produced, the charter was rather to begin on the day of the delivery of the ship to the charterer in condition to carry cargo. This, however, had not yet ensued at the time of the arrest. Furthermore, the judge of first instance errs concerning the burden of proof, in laying upon the claimant the proof that the chartering to Furness, Withy & Co. was not done in the interests of the English Government. Moreover, article 55 c of the Prize Code is a provision to be strictly interpreted one which does not permit of application by analogy. In the oral pleading before the superior prize court the claimants also contended that unneutral service, in the sense of article 55 of the Prize Code, could only be assumed if the service to the enemy was voluntary. Such was not the case here, however, because the claimant had been compelled to conclude the charter, for only under this condition was their ship released by the English. The imperial commissioner before the superior prize court denied this contention, and asked that the appeal be rejected.

Unneutral service.

This petition should be granted.

The judge of the lower court pronounced the condemnation of the vessel in accordance with article 55 c of the Prize Code, the relevant version of which reads as follows:

"A neutral ship renders unneutral service to the enemy if it is chartered by the enemy government."

Therefore, the question next presents itself whether in the present case chartering *by the enemy government* can be regarded as proved. The superior prize court

does not hesitate to affirm this in common with the judge of first instance. According to official information of the German Admiralty staff, the English firm, Furness, Withy & Co., who concluded the contract of charter with the claimant, is notoriously an agent of the English Government. There is no ground for doubting the accuracy of this information; it is, moreover, substantiated by other circumstances. The contract between the claimant and the above-named firm was concluded after the English Government had already compelled the ship to sail for six months on her account under the English flag. That this in itself involved service for the English Government is evidenced by the entry in Lloyd's Shipping Register, 1916–17—mentioned by the judge of first instance—where against the name of the vessel is noted: "Requisitioned by the Admiralty." Only upon an engagement to charter the vessel for a considerable time to an English firm was the English Government prevailed upon to give up the ship to its owners. The presumption that in reality this charter was only a mode of continuing the previous service on behalf of the English Government is therefore not refuted. In addition to this, the charter was entered into principally for trips to France and Italy. Since the English Government, as is well known, has undertaken to supply these countries with all the necessities of war, especially with coal, it goes without saying that the English Government had an especial interest in the acquisition of tonnage for this service. The contentions of the claimant tending to prove that, contrary to the assumption of the judge of first instance, in the fall of 1916 there was as yet no lack of cargo space in England, are not pertinent. Otherwise, charter rate of £8,055 a month, or about 2,000,000 marks a year, for a ship of 3,208 gross registered tonnage, for which a purchase price of some 300,000 marks was paid in 1914, would be utterly inexplicable.

Agent of Government.

Such being the state of affairs, one can not but agree with the prize court in its assumption that the steamer *Island* was chartered by the English Government. That the contract was not concluded through an official organ of the Government, or in its name, is of no consequence. According to the sense and the purpose of the provision of the Prize Code, it is sufficient that the charter was

entered into for the account of and in the interests of an enemy government.

The second plea of the claimant is to the effect that article 55 c of the Prize Code could have no application because at the time of capture the ship was not yet subject to the terms of the charter, for the latter, according to sections 1 and 26 of the original text of the contract—presented in the court of second instance—was only to come into force upon the delivery of the ship ready for loading in a port on the east coast of England. This is correct to the extent that certainly from the point of view of private law the charter had not yet begun to run; that is to say, that the obligations of the firm of Furness, Withy & Co. toward the claimant only began at the time mentioned. This civil law point of view, however, can not be decisive here. On the contrary, the matter stands thus: The ship was engaged upon this trip to England in order to fulfill the charter contract, i. e., to place itself at the immediate disposition of the charterer, arrived at the east coast of England. The sole cause and purpose of the voyage was the fulfillment of the contract, by which the ship was thus bound to undertake this voyage, too. What the decision would be had the vessel been chartered for some future period, and at the time of capture had been on a voyage in no way connected therewith, an independent, harmless carriage of freight, does not need to be discussed. In this instance the case is different, and to it article 55 c of the Prize Code must be applied. The pertinent section of the Prize Code concerns itself with direct unneutral service. The article mentioned deals specifically with service rendered the enemy government by furnishing cargo space. The declared purpose of article 55 c is, then, to prevent the increase of enemy tonnage through the charter of neutral ships. Regarded from this point of view, the unneutral service in the present instance had already begun when the steamer *Island* left in ballast for England, there to fulfill the terms of the charter.

Entering into force of charter.

It is impossible to expect of a belligerent power that it should release a ship chartered to its enemy which had fallen into its hands while on the way to assume the obligations of the charter, because in the private-law sense the charter contract had not yet begun to run. Thus the conclusion of the judge of first instance is to be assented to, even though his assumption that the charter

contract was already running at the time of the arrest of the *Island* proved incorrect in view of proofs produced in the court of second instance.

Whereas, finally, the plaintiff contends that unneutral service was not involved, because he was forced into the contract with the English firm, that does not follow. The superior prize court has already repeatedly taken a position in the negative (cf. the *Kiew*) on the question whether it is of importance that an act of which cognizance is taken in prize law be committed under the influence of psychological compulsion. As it was considered in the last-mentioned decision sufficient proof of enemy destination that the goods were on their way to enemy territory, knowingly and intentionally—even if under the influence of coercion—so, in this case, it must suffice that the ship was chartered for the English Government, even if the conclusion of the contract may not have resulted from a spontaneous decision of the owners. Moreover, in this case, the chartering did represent the desire of the owners. They could have declined to conclude the contract had they been willing to forego a profit which was only to be attained by unneutral service. As, therefore, the condemnation of the vessel was rightly decreed by the judge of first instance, and therefore no question of compensation for the plaintiff is at issue, at the same time as the decision of the main point, the further complaint of the plaintiff, against the evaluation made by the judge of first instance, can be held to have been disposed of without opposition. The judgment is therefore affirmed; costs to be decided according to section 37 of the prize court rules.

Condemnation affirmed.

THE "DRAUPNER"

June 27, 1918

(2 Entscheidungen des Oberprisengerichts in Berlin, 62)

In the prize matter concerning the Norwegian steamer *Draupner*, home port Bergen, the imperial superior prize court in Berlin, in its session of June 27, 1918, decided:

On the appeal of the owners the decree of February 22, 1918, of the imperial prize court in Hamburg is altered to this extent: The destruction of the ship is declared to have been illegal and hence the claim of the owners to compensation is legitimate. For the deter-

mination of the amount of the claim, the matter will be remanded to the court of first instance. The decision concerning the costs of the owners' appeal is reserved. The appeal of the War Risk Insurance Co. for Norwegian Ships is dismissed with costs.

Reasons:

Statement of the facts.

On November 30, 1916, the Norwegian steamer *Draupner*, in ballast from St. Nazaire to Cardiff, was brought to by a German submarine and destroyed. The ship was time chartered to the French coal firm, Compagnie de Charbons de Blanzy et de l'Ouest, in Nantes. The charter dated from August 7, 1915, and was repeatedly extended, the last time on August 9, 1916, until the end of January, 1917. Under the charter, the ship had been employed exclusively in the coal transportation service between England and France, and was at the time when it was sunk returning from such a voyage to reload in England. According to the official report, destruction ensued because, although ostensibly the ship was chartered by a private firm, in reality this firm was only a go-between for the English Government, which had secured complete disposition of the vessel in order to make use of it in fulfilling its obligation to deliver coal to France. The private firm served only to veil the real facts, in order to circumvent the provisions of article 55 c of the Prize Code.

Charter.

Judgment of Hamburg prize court.

The imperial prize court in Hamburg held the destruction of the ship valid and dismissed the claim of the owners on account of the vessel, as well as that of the War Risk Insurance Co. for Norwegian Ships on account of the effects and wages of the crew. The decision is based upon article 55 c of the Prize Code, according to which unneutral service exists if the vessel is chartered by an enemy government. It is notorious, so it was declared, that England had obligated herself to supply coal to France and Italy, and it is well known that without permission of the authorities in England no vessel may clear from an English port. How important a part coal plays in the present war needs no further elucidation. Even if it was effected between private firms on both sides, the supply of coal to France and Italy could only take place with the consent of the English Government, which, with every load, so far acquitted itself of the obligation it had assumed. All this was likewise known to and desired by the neutral owners, who, by corrections

in the original draft of the charter, had expressly revealed themselves privy to the fact that goods were to be included in the cargo which would lay the vessel open to seizure by the German forces. For such a situation the provisions of article 55 c of the Prize Code seem to have been made. During a war it is not likely that an enemy government will itself charter a vessel. They will, rather, employ private individuals for that, as was customary even before the London conference in the Russo-Japanese War, as regards the relations between the Russian Government and German shipowners. Therefore, under "chartering," in article 46 of the Declaration of London, to which article 55 c of the Prize Code conforms, reference can not be made only to the instances when the government appears itself as the charterer, but to all cases where the ship is placed at the disposal of the enemy government by means of the charter party, and the neutral owner knew and intended this.

Declaration of London.

The appeal of the owners entered against this decision appears to be well founded.

The claimants appeal in the first place to article 112 of the Prize Code. They contended, and in this court have again reverted to the contention that, according to article 112, section 2, the destruction of a neutral ship for unneutral service might only be effected if certainty existed that the fact could be proved before the prize court, and hence, that if the evidence which the ship's officer had at his command left room for doubt, the destruction must be held illegal and the claim for compensation allowed, even if later in the proceedings before the prize court, the fact of unneutral service was proved.

Destruction of neutral vessel.

The prize court was right in rejecting that contention. It requires no further argument that the Prize Code could not have intended any such contradictory provision. Article 112, section 2, of the Prize Code is not ambiguous. Its sole purpose is to keep before the mind of the commander what important consequences his decision may have, and what he must keep especially in view before he proceeds with the destruction. The judge of the first instance also raises the question whether the voyage of the ship does not involve a continuous voyage whereby the trip in ballast would be part of the carriage of the coal. He leaves it undecided whether even in this case the capture, and the final destruction, can not be justified. However, the suggestion must be thrown out.

Continuous voyage.

For even if one wishes to regard it from the point of view of carriage of contraband, one would be forced to admit that capture can no more take place on the ground of a complete carriage than on the ground of one merely contemplated but not yet begun. Therefore, only the actual stipulations of article 55 c come under consideration. The provision required—in the form in which it applied at the time the ship was captured—that the vessel be chartered by the enemy government. That in the meantime the law has been changed so that it suffices for the vessel to have undertaken the voyage in the interest of the enemy's conduct of the war, can not be regarded by the prize court, which incidentally draws no inferences from the fact, as a merely interpretive explanation. On the contrary, a new and essentially more comprehensive provision is established along with the former. Moreover, it must be observed that, so far as concerns the original version, which corresponds with the Declaration of London, the definite limitation of the general notion which is to be found also in section c is to be referred to the instigation of the German representative at London. Just on this point he opposed the more general and elastic wording of the proposition of the English. Nor can anything be concluded from that fact that the English text of the Declaration of London, instead of speaking of "chartered" vessels, speaks of those in the "employment" of the government. The French is the official text, and the more elastic expression of the English translation is to be referred to it for its true meaning.

Article 55 c of German Prize Code.

At all events, it is correct to say that it makes no difference whether the government be named in the charter as a party to the contract, whether the former be drawn up in writing or agreed to by word of mouth. On that principle the superior prize court has already rendered a decision—the *Island*. Otherwise the provision would be meaningless in practice. For there is nothing easier than to find private concerns who are ready to enter, ostensibly as contractants, into a charter party which is really being concluded for the government. It must suffice that the vessel be placed at the disposition of the government as fully as if it had itself chartered her.

So far the reasoning of the decision from which appeal is taken may be followed. On the other hand, there is

no ground for the assumption that the circumstances of the present case correspond with the fundamental requirement.

Deliveries of coal to France and Italy.

It is, of course, well known that the English Government has pledged itself to deliver stipulated quantities of coal to France and Italy. From this it may at once be concluded that the supply of this coal is dependent upon an extensive control on the part of the English Government. But contract of this sort may be exercised without the Government necessarily taking the exportations directly into its own hands. There is no support for the contention that one had entered into the execution of a Government operation in England on this behalf. When it is reported that in the countries of destination—France and Italy—committees were to be formed to distribute the necessary amount of coal in the different districts, and likewise in England committees to insure the equal distribution of the orders; if, moreover, fixed prices for the coal and fixed maximum rates for the freight were established; when, furthermore, the English Government reserves to itself the sanction of every single charter party to be concluded with a Norwegian shipowner, that all tends to prove that in regard to the supply of coal to France and Italy, the free traffic of the open freight market, even if strictly controlled and more or less limited, is in no wise excluded, and that the conveyance of the coal was not accomplished directly by the Government itself. Moreover, it must be considered that the present case concerns itself with a charter agreement with which no English firm was concerned at all, one which, on the contrary, was concluded directly between the French importer and the Norwegian shipowner.

It is not denied that our interests in the conduct of the war demanded that we combat this coal transportation by all the means at our disposal. The proposition that wars are only carried on against the military forces of the States involved in war no longer holds to-day. At all events, it does not hold of the present war, upon which the stamp of the English method of conducting war has been more and more impressed. In addition to the direct employment of armed forces, all possible means of weakening the economic life of the enemy countries are employed as measures of war, and, to that extent, one is warranted in saying that every ship taking

coal to France or Italy is opposing the purpose of our conduct of the war and supporting that of our enemy. The application of this theory to the administration of justice finds its limits at the point where positive legal axioms are encountered. On these and their observance the neutral must be able to rely, if faith in law and justice is not to be deceived and shattered. Even if the greater severity which the Prize Code assumed by the new version of article 55 c was warrantable, it still remains true that it can not be applied to a time at which it was not yet in force.

Thus the detention of the vessel is proved unjustifiable, and the appeal of the owner succeeds.

Claim of insurance company.

On the other hand, the claim of the insurance company for wages and effects of the crew was correctly denied. In the first place, it is insufficiently supported by the claimants in that a policy has neither been presented nor even an allegation set up as to who the insured is or are, whose rights the claimant is prosecuting before the prize court. The claim on behalf of wages lost is further opposed by the consideration that it is not clear what wages are involved. If it is the wages for the current voyage and if, as is to be assumed by the statement of the owners and from the claims asserted by them, the freight was paid in advance, then the amount of the wages will be made good from the compensation for the freight, which amount the owners may on no account retain for themselves. According to the assertion now made by the claimant, which has been verified by documentary evidence, it must be borne in mind that, concerning the wages as well as the effects, it is not a question of real insurance and of indemnification for an actual loss which gives the measure of the amount of damages.

Wages.

On the contrary, the claims are made in virtue of a law—which was unmistakably promulgated to counteract the aversion of sailors to service on board ship, which has become very dangerous—to give to every member of the crew, officers as well as men, a definite sum, figured in round numbers, upon the loss of their vessel, without regard to whether wages and effects had actually been lost, and if so, to what extent.

Compensation for such performances can certainly not be demanded. Granted that the capturing State is bound according to prize law to make compensation for damages, it only has to compensate for losses which have

actually occurred. But there can not be included in that the expenses that a third party—here, the State—grants to those who were involved in the affair, without regard to whether damages have occurred or not and how high they run.

Therefore the judgment is affirmed.

THE "ESPERANZA"

June 27, 1918

(2 Entscheidungen des Oberprisengerichts in Berlin, 169)

In the prize matter concerning the Norwegian steamer *Esperanza*, home port Tonsberg, the imperial superior prize court in Berlin in its session of June 27, 1918, decided:

The appeal against the judgment of the imperial prize court in Hamburg of February 22, 1918, is dismissed with costs.

Reasons:

Statement of fact. On January 15, 1917, the Norwegian steamer *Esperanza*, in ballast from Spezia to Barry, was brought to and sunk by a German submarine. The ship was chartered to the firm of Furness, Withy & Co. for 12 months under date of February 4, 1916, and had carried coal to Italy. She was on the return voyage to England to take on a new cargo of coal. Appeal is brought by the owners for the ship, equipment, and expenses of repatriating the crew and by the War Risk Insurance Co. for Norwegian Ships for the lost wages and effects of the crew.

Decision of Hamburg prize court. The imperial prize court in Hamburg held that the destruction of the ship was legal and dismissed the claims. The decision is based on article 55 c of the Prize Code, according to which one is guilty of unneutral service if the vessel is chartered by an enemy government. It is notorious, so it was said, that England had assumed the obligation of delivering coal to Italy and France, and it is known that without permission of the authorities in England no ship might leave an English harbor. What an important rôle coal plays in the present war does not need to be expatiated upon. The supplying of coal to France and Italy, even if it was effected between private concerns, could only take place with the permission of the English Government, which, with each delivery, acquitted itself to that extent of the obligation it had

Supply of coal to France and Italy.

assumed. The neutral owners knew and intended this, for by corrections in the draft of the charter they explicitly declared that they understood that goods were to form the cargo which would lay the vessel open to the danger of capture by the German forces. Such a case is provided for by the provisions of article 55 c of the Prize Code. It is unlikely in war that an enemy government should itself charter the vessel; it will rather employ private individuals for that, as was the custom even before the London conference in the Russo-Japanese War in the relations existing between the Russian Government and German shipowners. In article 46 of the Declaration of London, to which article 55 c of the Prize Code conforms, under the head of "chartering" reference must be made, not only to the case where the Government itself appears as charterer, but to all those instances in which the vessel is at the disposal of the enemey government and the neutral owners know and desire it.

Declaration of London.

The appeal of the claimants entered against this judgment fails. In his conclusion the judge of first instance must be upheld, even if the deductions in the grounds for the decision can not always be considered correct.

If at the time of capture article 55 c of the Prize Code had already been in force in the form which it acquired by the ordinance of July 29, 1917, the decision would be rendered without further ado. For it is not contested that the vessel was on a voyage from and to enemy territory and was chartered by an enemy subject. One would have to assume, therefore—as the facts do not gainsay the assumption, of which more later—that the vessel had set sail "in the interests of the enemy's conduct of the war." But the law did not yet read thus when the *Esperanza* was destroyed, and the judge of first instance can not be concurred with in assuming that the supplementary law of July 29, 1917, did not add anything new, but was rather a commentary on the law already in force. One must not forget that article 55 c of the Prize Code, like its prototype article 46 of the Declaration of London, set itself the task of circumscribing the uncertain and vague conception of unneutral service. When, under section c it is specified that the ship be "chartered by the enemy government," one may indeed say that every vessel so chartered is sailing in the interest of enemy conduct of the war. But it

Article 55 c of German Prize Code.

Charter to enemy government.

won't do at all simply to transpose the sentence. On the other hand, it is quite correct that it can make no difference whether the enemy government is designated in the contract of charter as the charterer, or whether it appears at all as party to the contract. The provision would otherwise be without practical significance, for if an enemy government wishes to secure for itself the disposition of a merchant vessel, without this fact appearing, nothing is easier than for it to employ a go-between for this purpose, who puts himself forward in place of the government in the rôle of charterer. In the sense of the provision of the law it must suffice that the government has in fact secured that control over the vessel that it would have procured by a contract of charter concluded directly with the owner.

In the cases of the *Draupner*, *Asta*, and *Saga*, decided at the same time as the present case, where the capture and destruction of the vessels took place under apparently similar circumstances, the court refused to affirm the condemnation. Here, on the contrary, the particular circumstances lead to a contrary decision.

The *Draupner* and the *Astra* were chartered directly by the Norwegian owners to French coal companies, who were outside the immediate sphere of power of England, and the *Saga* was admittedly chartered by an English firm, but nothing was known of the latter's connection with the Government. Moreover, this firm had subchartered the vessel to different firms for the current and several previous voyages, and that not only for the transport of coal. The *Esperanza*, on the other hand, was leased to the firm of Furness, Withy & Co., in London, whose relation to the English Government has already come to the knowledge of the court in the prize matter of the *Island*.

The *Island*.

In that case, too, it was a neutral ship that was chartered by the above-mentioned firm, and it was evident from the accompanying circumstances that it was a question only of the execution of a demand for the ship made by the Government in this form. The relation of this firm to the English Government, which can be deduced from the above, is fully elucidated by an incident in the English House of Commons, of which a report is given in No. 1756 of "Fairplay" for April 5, 1917. According to it, upon a question being raised in Parliament concerning rumors of excessive war profits of ship-

owners, and of the very firm in question, the latter was protected by the Government representative. He explained that "during the period August, 1914, to March 15, 1917, many neutral vessels have been chartered by Furness, Withy & Co. on behalf of His Majesty's Government;" that the Government had never paid even a commission to the firm. On the contrary, that even such commission as they draw from foreign shipowners they place to the credit of the Government and that the Government is glad to seize the opportunity to express its thanks to the company "for their ungrudging and invaluable services." So in the present case, in the charter concluded with the owners, Furness, Withy & Co. have arranged for a commission of 2½ per cent for themselves as intermediary which, it is to be assumed from this explanation of the English Government representative, has also been placed to the credit of the English Government. Further light is shed upon the facts and law of the case by the correspondence of the firm with the captain, which was found among the ship's papers. It was addressed to Palermo, and directed the captain to deliver up his cargo to the Italian Government if the consignee should not be on the spot, as they were covered against claims for recovery which might be preferred by the rightful possessors of the bills of lading. Accordingly, the charterer was in a position to deliver his entire cargo of coal to the Italian Government without regard to the possessor of the bill of lading, a fact which shows unmistakably that on the English side as well it was a question of a transaction of the Government.

In view of all this, there can be no doubt that the firm, Furness, Withy & Co., was only concerned in the matter as an organ of the English Government, and that the latter had the same power of disposition over the vessel as if it had itself concluded the charter. According to what has been said above, the requirement of article 55 c of the Prize Code seems to be fulfilled. The vessel was, therefore, legally captured, and as a sequel destroyed.

Destruction of neutral vessels

The claimants rely upon article 112 of the Prize Code. In the court of first instance they contended, and have reverted to the contention in this court, that according to article 112, section 2, of the Prize Code, the destruction of a neutral ship for unneutral service

may only take place when certainty exists that the fact can be proved before the prize court, and hence, if the evidence at the command of the ship's officer still left room for doubt, the destruction of the prize must be declared illegal and indemnity allowed, even if in the proceedings before the prize court the fact of unneutral service is proved. The prize court was right in dismissing that contention. Article 112, section 2, is not ambiguous. Its sole purpose is to remind the commander what serious consequences his decision may have, and what he must especially aim at before proceeding to the destruction.

So far as concerns the appeal of the War Risk Insurance Co. for Norwegian Ships on account of lost property and wages of the crew, this appeal also fails if for no other reason than that article 115 of the Prize Code, upon which the claimant relies, only provides indemnity for neutral *cargo*.

For these reasons, the judgment is affirmed.

THE "SYLVAN ARROW"

([1923], P. 220)

Syllabus. *Shipping—Collision—Ship under Government requisition—Officers and crew servants of Government—Action in rem for collision damage—Whether maritime lien attaches after ship released from requisition.*

While under requisition by, and manned and operated by, the United States Government, the defendants' steamship was in collision with and did damage to the plaintiffs' steamship. After the vessel had been released from requisition the plaintiffs commenced an action in rem for their collision damage. In that action the defendants pleaded (inter alia) that "at the time when the collision is alleged to have taken place the *Sylvan Arrow* was under requisition by and under the sole control and management of the Government of the United States and was being navigated by persons who were the servants of the said Government and for whose negligence the defendants were and are in no wise responsible. * * * The defendants say that the action is not maintainable in rem by reason of the facts set out" above. On the hearing of this question as a preliminary point of law:

Held, on the facts, that the defendants had surrendered their vessel to the United States Government under compulsion, that in no sense could it be said that the master and crew derived their authority from the defendants, and that in the circumstances no maritime lien attached to the vessel by reason of the collision and her owners were not, either through their vessel or otherwise, liable to the plaintiffs.

Quaere, as to where an owner voluntarily places his vessel in the possession and control of charterers or other persons, whether *The Lemington* ([1874] 2 Asp. M. L. C. 475) was correctly decided, having regard to the principles laid down in *The Parlement Belge* ([1880] 5 P. D. 197, 218) and other cases.

Action of damage by collision.

The plaintiffs were the owners of the steamship *W. I. Radcliffe*.

The defendants were the owners of the steamship or vessel *Sylvan Arrow*.

Statement of facts.

On December 1, 1918, a collision was alleged to have taken place in New York Harbor between the plaintiffs' steamship *W. I. Radcliffe* and the defendants' steamship *Sylvan Arrow*. The *Sylvan Arrow*, a vessel owned by the Standard Transportation Co., an American corporation, was at the time of the alleged collision admittedly manned and operated by officers and men appointed by the United States Navy Department, under a form of requisition charter entered into between the owners and the United States Government, pursuant to an order of requisition dated December 29, 1917. On July 6, 1922, after the *Sylvan Arrow* had been returned to her owners, the owners of the *W. I. Radcliffe* commenced the present action *in rem* against the *Sylvan Arrow*, and although the two years allowed by the maritime conventions act, 1911, for the commencement of actions had expired, they obtained the leave of the court to maintain their suit. By their defense of that action the owners of the *Sylvan Arrow* pleaded that they had no knowledge or information of the alleged or any collision between the *Sylvan Arrow* and the *W. I. Radcliffe;* that "(2) alternatively if any collision took place between the *W. I. Radcliffe* and *Sylvan Arrow*, which the defendants do not admit, the defendants deny that the collision and damage mentioned in the statement of claim were caused or contributed to by the alleged or any negligence on the part of themselves or their servants. At the time when the said collision is alleged to have taken place the *Sylvan Arrow* was under requisition by and under the sole control and management of the Government of the United States and was being navigated by persons who were the servants of the said Government and for whose negligence the defendants were and are in no wise responsible. * * * (4) The defendants say that the action is not maintainable *in rem* by reason of the facts set out in paragraph 2 hereof."

The question of law so raised was argued as a preliminary point.

Argument for defendants.

Raeburn, K. C., and Dumas for the defendants: All the old cases dealing with this matter are to be found summarized in the judgment of Gorell Barnes, J., in *The Ripon City*.[65] In every case where the owner has been found liable for damage done by his ship while she was in the possession and control of other persons it has been because the owner has voluntarily parted with the possession and control of the vessel to those other persons, and those who have been guilty of the negligence must be deemed to have derived their authority from the owner. The owner would be liable even if he had handed over the vessel to charterers under a demise charter, which put it out of his power to choose the master and crew, if he had entered into the charter voluntarily. Here there was not a voluntary surrender but a compulsory taking by the United States Government. You can not imply the owner's authority, and therefore no maritime lien attaches to the vessel and her owner is not liable.

Argument for plaintiffs.

Dunlop, K. C., and Ballock for the plaintiffs: The Documents establish that the notice of requisition was never acted upon and that at the date of the collision, the *Sylvan Arrow* was in the possession of the American Government as charterers by demise, under a charter party dated December 29, 1917, and an agreement made on July 15, 1918. It was from the charter party and agreement that the American Government derived their authority and not from the order of requisition. There is no evidence that the Government had any power to compel the owners to enter into the said charter party and agreement, or that the vessel was handed over under any compulsion. Instead of requisitioning the vessel the Government preferred to make a voluntary agreement for hire. It is none the less voluntary because, if the defendants had not agreed, the Government had power to take the vessel by a totally different proceeding. There is no suggestion in the defendants' affidavits that they entered into the agreement because they had been served with a requisition order. All they say is that they entered into a requisition charter, and for all the evidence to the contrary that charter may have been entered into at the owners' request. The return of the vessel is not a release from a requisition order but a redelivery from a requi-

[65] [1897] P. 226.

sition charter. If the owners have voluntarily given the charterer the option of putting his own crew on board and exercising sole control of the navigation, the crew are deemed to have derived their authority from the owners through the charter, and a maritime lien attaches to the vessel for damage occasioned by the negligence of the crew: See *The Lemington*,[66] the judgment in which case was approved by Gorell Barnes, J., in *The Ripon City*.[67]

[They also referred to *The Edwin*[68] and *The Tervaete*.[69]]

Raeburn, K. C., in reply: The chain of cases which include *The Ticonderoga*[70]; *The Lemington*[66]; *The Tasmania*[71]; and *The Ripon City*[67] would seem to have grown up before it was fully appreciated that the liability of the ship and the liability of the owner must march together; see, moreover, *The Parlement Belge*[7] and *The Utopia*.[72] The compulsion was to give up the possession of the ship under the requisition order. The agreement was merely as to the terms of the requisition.

July 16. HILL, J.: On December 1, 1918, the plaintiffs' steamship, the *W. I. Radcliffe*, and the defendants' steamship, the *Sylvan Arrow*, were in collision in New York Harbor. The *Sylvan Arrow* was then, and still is, owned by the defendants, the Standard Transportation Co., a private corporation, registered under the laws of the State of Delaware. It is admitted, and clearly appears from the affidavits put in, that at the time of the collision the master and crew of the *Sylvan Arrow* were the servants not of the defendants but of the American Government, appointed, employed, and controlled by the Navy Department. The issue now to be determined is whether, assuming the collision to have been caused by the negligence of those in charge of the *Sylvan Arrow*, any maritime lien attached to the *Sylvan Arrow*, and whether by reason of such lien the defendants can be proceeded against by writ *in rem* against the ship. The defendants raise this question by paragraph 2 of the defense: "The *Sylvan Arrow* was under requisition by and under the sole control and management of the Government of the United States and was being navigated by persons who were the servants of the said Government and for whose negligence the defendants were and are in nowise responsible." The plaintiffs argued that this did

Requisition.

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[7] 5 P. D. 179.
[66] 2 Asp. M. L. C. 475.
[67] [1897] P. 226.
[68] (1864) Br. & Lush. 281.
[69] [1922] P. 259.
[70] (1857) Swa. 215.
[71] (1888) 13 P. D. 110.
[72] [1893] A. C. 492.

not truly represent the facts and that the facts should be stated thus: "The *Sylvan Arrow* was chartered by the defendants as owners to the Government of the United States under a charter party operating as a demise and was therefore under the sole control and management of the Government of the United States and was being navigated by persons who were servants of the said Government and for whose negligence the defendants were and are in nowise personally responsible." The plaintiffs contend that upon those facts the ship became subject to a maritime lien, and that an action can be maintained to enforce it. They rely, of course, upon *The Lemington* [66]—a decision of Sir Robert Phillimore in 1874—and the dicta in *The Ticonderoga* [73]—Doctor Lushington, 1857 and *The Tasmania* [74] (Sir James Hannen, 1888) and *The Ripon City* [67] (Gorell Barnes, J.). Some day, and probably by a higher court, *The Lemington* [66] and those dicta and the contrary dictum of Doctor Lushington in *The Druid* [75] will have to be considered in the light of the principles so clearly laid down by the court of appeal in *The Parlement Belge* [76] by the House of Lords in *The Castlegate* [77] and by the privy council in *The Utopia.* [78] The general principle is thus stated in *The Utopia*: [79] "The foundation of the lien is the negligence of the owners or their servants at the time of the collision, and if that be not proved no lien comes into existence, and the ship is no more liable than any other property which the owners at the time of collision may have possessed. In the recent case of *The Castlegate* [77] * * * language used by the present master of the rolls in *The Parlement Belge* [76] which expresses the above view, was quoted with an approval which their lordships desire to repeat." What Brett, L. J., said was: "Though the ship has been in collision and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she can not be made the means of compensation if those in charge of her were not the servants of her then owner, as if she was in charge of a compulsory pilot." In *The Castlegate* [77] Lord Watson stated the principle of the maritime law to be that "inasmuch as every proceeding *in rem* is in substance a proceeding against the

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[66] 2 Asp. M. L. C. 475.
[67] [1897] P. 226.
[73] Swa. 215.
[74] 13 P. D. 110.
[75] (1842) 1 W. Rob. 391.
[76] 5 P. D. 197, 218.
[77] [1893] A. C. 38, 52.
[78] [1893] A. C. 492, 497, 499.
[79] 2 Asp. M. L. C. 475, 478.

owner of the ship a proper maritime lien must have its root in his personal liability." He then refers to damage actions (*The Lemington* [66] and *The Ticonderoga* [73] had been cited) and says: "It was argued that the case of lien for damages by collision furnishes another exception to the general rule, and there are decisions and dicta which point in that direction; but these authorities are hardly reconcilable with the judgment of Doctor Lushington in *The Druid* [75] or with the law laid down by the court of appeal in *The Parlement Belge*," [7] and he then quotes Brett, L. J. But it may be that for me, *The Lemington*,[79] which is a direct decision, is the governing authority. Let us see what the decision in that case and the dicta in the other cases come to. If they are law, they make an exception to the general rule. What precisely is the exception? In *The Ticonderoga* [80] the observations of Doctor Lushington appear to me to be clearly obiter. In that case it does not appear that the master and crew were appointed or paid by the charterers—the French Government—but only that the ship was under the orders of the charterers, "in the service of the French Government." In the course of his judgment he said: "I am not aware, where there has been any proceeding *in rem*, and the vessel so proceeded against has been clearly guilty of damage, that any attempt has been made in this court to deprive the party complaining of the right he has by the maritime law of the world of proceeding against the property itself. Supposing a vessel is chartered so that the owners have divested themselves, for a pecuniary consideration, of all power, right, and authority over the vessel for a given time, and have left to the charterers the appointment of the master and crew, and suppose in that case the vessel had done damage, and was proceeded against in this court—I will admit, for the purposes of argument, that the charterers, and not the owners, would be responsible elsewhere, although I give no opinion upon that point—but still I should here say to the parties who had received the damage, that they had, by the maritime law of nations, a remedy against the ship itself." Then he goes on to contrast the case of a pilot by compulsion. The next case is *The*

The Ticonderoga.

[7] 5 P. D. 197.
[66] 2 Asp. M. L. C. 475.
[73] Swa. 215.
[75] (1842) 1 W. Rob. 391.
[79] 2 Asp. M. C. L. 475, 478.
[80] Swa. 215, 217.

The Lemington. *Lemington*,[79] in which Sir Robert Phillimore said: "I think the law was correctly laid down by Doctor Lushington * * * in the case of *The Ticonderoga*;"[73] and he went on: "A vessel placed by its real owners wholly in the control of charterers or hirers, and employed by the latter for the lawful purposes of the hiring, is held by the charterers as *pro hac vice* owners. Damage wrongfully done by the *res* whilst in possession of the charterers is, therefore, damage done by the 'owners' or their servants, although those owners may be only temporary. Vessels suffering damage from a chartered ship are entitled *prima facie* to a maritime lien upon that ship, and look to the *res* as security for restitution. I can not see how the owners of the *res* can take away that security by having temporarily transferred the possession to third parties. A maritime lien attaches to a ship for damage done, through the negligence of those in charge of her, in whosesoever possession she may be, if that damage is inflicted by her whilst in the course of her ordinary and lawful employment, authorized by her owners. Whether the damage is done through the default of the servants of the actual owners, or of the servants of the chartering owners, the *res* is equally responsible, provided that the servant making default is not acting unlawfully, or out of the scope of his authority." It will be observed that in both those cases—I am not quite sure that it does not color much of the earlier judgments in this matter—the ship is spoken of as being "the guilty party." The next case is *The Tasmania*,[81] in which Sir James Hannen reviewed the cases; and in *The Ripon City*[82] Gorell Barnes, J., expressed the opinion that *The Lemington*[79] was rightly decided. Speaking of *The Parlement Belge*,[7] and the dicta I have referred to, he said: "I am convinced that the judges did not intend to decide that in no circumstances can a maritime lien be obtained unless the owners of the *res* are personally liable in respect of the claim. It will be found, in accordance with modern principles and authorities, that there are certain cases in which a maritime lien may exist and be enforced against the property of

Maritime lien.

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[7] 5 P. D. 197.
[73] Swa. 215.
[79] 2 Asp. M. L. C. 475-478.
[81] 13 P. D. 110.
[82] [1897] P. 226, 242, 244.

persons not personally liable for the claim, and who are not the persons who, or whose servants, have required the service or done the damage." A little later, speaking of a maritime lien, he says: "This right must, therefore, in some way have been derived from the owner either directly or through the acts of persons deriving their authority from the owner." Then he considers the case of a chartered ship: "The principle upon which owners who have handed over the possession and control of a vessel to charterers, and upon which mortgagees and others interested in her who have allowed the owners to remain in possession are liable to have their property taken to satisfy claims in respect of matters which give rise to maritime liens, may, in my opinion, be deduced from the general principles I have above stated and thus expressed. As maritime liens are recognized by law, persons who are allowed by those interested in a vessel to have possession of her for the purpose of using or employing her in the ordinary manner, must be deemed to have received authority from those interested in her to subject the vessel to claims in respect of which maritime liens may attach to her arising out of matters occurring in the ordinary course of her use or employment, unless the parties have so acted towards each other that the party asserting the lien is not entitled to rely on such presumed authority. In my opinion, it is right in principle and only reasonable, in order to secure prudent navigation, that third persons whose property is damaged by negligence in the navigation of a vessel by those in charge of her should not be deprived of the security of the vessel by arrangement between the persons interested in her and those in possession of her. * * * The persons interested in a vessel in placing her in the possession and control of other persons, to be used or employed in the ordinary way, must contemplate that claims may arise against her in respect of rights given by the maritime law, and may be taken to have authorized those persons to subject the vessel to those claims."

In these cases it will be seen that the liability of the ship and of the owner through the ship is based upon the fact that the negligent persons "derived their authority from the owner" and that "the owner placed the ship in the possession and control of other persons to be used and employed in the ordinary way"; and that "charterers in whom the control of the ship has been vested

by the owners are deemed to have derived their authority from the owners so as to make the ship liable for the negligence of the charterers who are *pro hac vice* owners." Let us see whether the United States Navy men in charge of the *Sylvan Arrow* derived their authority from the defendants—whether the defendants placed the *Sylvan Arrow* in the possession and control of the United States Government—whether the control of the ship was vested by the defendants in the United States Government. According to the affidavit of Mr. Ali sworn on October 12, 1922, paragraph 3, the *Sylvan Arrow* was requisitioned by the United States Government in December, 1917, and handed over under such requisition to the Navy Department on July 15, 1918, and remained under such requisition until January 21, 1919. To the affidavit of Mr. Morse (sworn on March 2, 1923) are exhibited the requisition charter party, and it is sworn that from July 15, 1918, to January 21, 1919, the *Sylvan Arrow* was under that portion of the exhibit which is designated the "bare-boat" form. By an affidavit sworn in this action on July 25, 1922, Mr. D. Radcliffe for the plaintiffs stated that the plaintiffs were advised that the *Sylvan Arrow* had been requisitioned by the United States Government in December, 1917, and in the following July had been taken over by the Navy Department, and was released by the Navy Department early in 1919. It was upon the strength of that affidavit that the plaintiffs obtained leave to maintain the action, notwithstanding that more than two years had elapsed from the date of the collision. The requisition charter party exhibited is executed by the defendants and by the director of operations for the United States Shipping Board. It is headed: "Requisition charter," and begins: "This requisition charter made and concluded upon in the District of Columbia the 29th day of December, 1917." It recites: "Whereas by requisition order dated December 29, 1917, pursuant to the urgent deficiency act of the 15th of June, 1917, and the President's Executive order of the 11th July, 1917, the United States has requisitioned the use of the steamship *Sylvan Arrow* * * * and whereas it is desired * * * to fix the compensation which the United States shall pay to the owner for the use of the steamship so requisitioned and to define by agreement the rights and duties of the United States and of the owner with respect to the operation of the vessel under the requisition * * *" Now therefore it is agreed as follows:

Requisition charter.

"First. The terms and conditions under which the vessel is to be operated shall be those contained in the 'time form' hereto annexed; provided, however, that at the time of the requisition or at any time thereafter, on five days' written notice, the United States may operate the vessel under the terms and conditions contained in the 'bare boat form' hereto annexed." The time form contemplates that the Government has taken possession of the ship and delivers possession back to the owner for the owner to operate the ship for the Government; under it the master and crew are the servants of the owner. The bare-boat form contemplates that the ship shal remain in the service of the United States under the requisition order, and provides that the United States shall man and operate the vessel. It is not quite clear, but I was told that in December, 1917, the ship was still in the builders' hands. From correspondence exhibited it appears that by direction of the United States Shipping Control Committee she was handed over to the Navy Department on July 15, 1918, and in the same month notice was given that the Government would operate the vessel under the "bare boat" form of charter. The precise status of the shipping control committee does not appear, but if it was not a branch of the United States Shipping Board or of the United States Shipping Board Emergency Fleet Corporation, the correspondence shows that its acts were ratified by the corporation.

From all this I draw the conclusion that the ship was in fact compulsorily surrended by the owners to the United States Government. I am the more certain of this conclusion because the ship was an oil tanker. In 1917–18 any shipowner who had a tanker free from Government control could have become "rich beyond the dreams of avarice." I see no reason why I should doubt the affidavits or the documents which state that the ship was requisitioned. It is said for the plaintiffs that no requisition order has been produced or disclosed, and it is suggested that in fact there was no order on December 29, 1917. Whether an order was actually made or not does not seem to me to matter much. If the intention to make an order were intimated to the owner, it would be as effective a compulsion as if it were actually drawn up. The essential fact is that the owner entered into the charter party because the United States Government had power to compel him to give possession of the ship to the

Urgent deficiency act.

Government. It was also said that the method adopted by the Government was not in strict compliance with the urgent deficiency act, 1917. By section 1 (*e*) the President is given power (inter alia) to requisition, or take over, the possession of * * * any ship now constructed or in the process of construction. By section 2 the President was given power to take immediate possession if his orders were not obeyed. By section 3 just compensation was to be paid, to be determined by the President, with a power to sue to persons dissatisfied with the amount. By section 4 the President may exercise the powers through such agency or agencies as he shall determine. By Executive order the President delegated his powers to the United States Shipping Board and the Emergency Fleet Corporation. It is said that because the Government, instead of fixing the just compensation for the *Sylvan Arrow*, proceeded to enter into a charter party with the owner defining the hire and the other mutual obligations of the Government and the owner, the element of compulsion disappeared and the owner must be treated as one who had voluntarily chartered his ship to the Government. I can not agree. Underlying the whole transaction was the compulsion—the fact that the Government had and would have exercised the power to take possession of the ship whether the owner consented or not, and also had power to operate the ship by its own servants if it so chose. I am not in the least suggesting that in fact the Government did not proceed in the precise way intended by the act; but, supposing it did not, the plaintiffs' case is no better, because if it exercised a compulsion illegally it exercised compulsion; if it exercised it legally it exercised compulsion. If it was illegal the position would be analogous to that of a ship which had been seized by pirates, in which case it could not possibly be suggested that the owner of the ship should, in form of procedure, be responsible for the negligent navigation by the pirates. Such being the position, it can not in any sense be said that the master and crew of the *Sylvan Arrow*, who were the servants of the United States Navy Department, derived their authority from the defendants, or that the defendants placed the ship in the possession and control of the Navy Department, or that the control of the ship was vested by the defendants in the Navy Department.

Accepting the decision in *The Lemington* [83] and the dicta in *The Ticonderoga*,[73] *The Tasmania* [81] and *The Ripon City* [84] as sound law, the facts of the present case do not come within them. Upon those facts I hold that no maritime lien attached to the vessel by reason of the collision and that the defendants are not, either through their vessel or otherwise, responsible to the plaintiffs for the collision damage. There will be judgment for the defendants, with costs.

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[73] Swa. 215.
[81] 13 P. D. 110.
[83] 2 Asp. M. L. C. 475.
[84] [1897], P. 226.